United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

74-2026

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For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

v.

BERNARD DEUTSCH, STANLEY DUBOFF and MILTON COHEN,

Appellants.

BRIEF FOR APPELLANT STANLEY DUBOFF

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STATEMENT OF THE ISSUES

1. Whether the Information advised the appellant of the charges against him with sufficient specificity so as to enable him properly to prepare his defense and avoid surprise.

2. Whether the court's refusal to grant various requested particulars was prejudicial error.

3. Whether there was a substantial variance between the charges allegedly proved and submitted to the jury and the charges contained in the Information.

4. Whether the charges allegedly proved and submitted to the jury were supported by evidence adduced before the Grand Jury.

5. Whether the evidence was sufficient to establish appellant's guilt of the charges beyond a reasonable doubt.

6. Whether the court erred in admitting testimony with respect to "kickbacks" allegedly paid to Duboff by one Bernard Shwidock, the President of Kelly Andrews & Bradley, Inc., and

an alleged co-conspirator.

7. Whether the court erred in admitting testimony and charts with respect to purchases by Financial Dynamics Fund and Financial Industrial Fund in the absence of any evidence showing a connection between those purchases and Duboff.

8. Whether the court erred in admitting testimony relating to the alleged relationship between Duboff and New Dimension Securities, Inc., an alleged co-conspirator.

9. Whether the court erred in admitting into evidence for the truth of its contents as a record kept in the regular course of business the telephone message slip indicating receipt of a telephone call from appellant in the absence of a person who prepared the slip.

10. Whether the court erred in admitting the testimony of a government attorney as an expert witness which testimony related in substantial part to questions of law which are the sole province of the court.

11. Whether the court's charge adequately instructed the jury of the elements of the crimes with which appellant was charged.

STATEMENT OF THE CASE

This is an appeal from appellant's conviction after trial by a jury in the United States District Court for the Southern District of New York, Honorable Robert J. Ward presiding, on all four counts of an Information filed by the United States Attorney.

The charges against appellant were originally contained in an Indictment with sixteen counts. At the suggestion of the court and with the consent of all parties, all defendants waived indictment and an Information was filed identical in all respects to the Indictment but consolidating the last fifteen counts into three counts for purposes of reducing the complexity of the case for the jury. It was the understanding of all parties that despite the use of an Information, the case would proceed in all respects and for all intents and purposes as if the defendants were being prosecuted on the original Indictment.

On July 16, 1974, Duboff was sentenced to three years imprisonment on each of the four counts, the sentence to run

concurrently. On July 18, 1974, appellant filed a notice of appeal to this court from that judgment of conviction and the sentence imposed thereunder.

STATEMENT OF THE FACTS

Count One charges appellant Stanley Duboff (hereinafter "Duboff") and various other persons named and unnamed with having conspired to violate various sections of Title 15 United States Code; to wit: Sections 77q, 77j and 77x, 78j(b), 78(ff) and 17 C.F.R. Rule 256(e).

In view of Duboff's position that the Information insufficiently describes the charges against him, it is necessary to set forth in some detail the charging provisions of the conspiracy count. After charging generally a conspiracy to violate the aforementioned sections in paragraph 6, the Indictment describes the conspiracy as follows:

Paragraph 7 states that it was a part of the conspiracy that defendants in connection with a purported public offering of the common stock of Richards Packing Company, Inc. (hereinafter "Richards") would use and cause the use of, the mails to transmit false and misleading offering circulars. The paragraph does not set forth in what respect the offering circulars are alleged to have been false and misleading. (A19-A20)

Paragraph 8 alleges that it was a part of the conspiracy that the defendants, in the offer and sale of Richards stock, by the use of interstate commerce and the mails, would (a) employ devices, schemes and artifices to defraud, (b) obtain money and property by means of untrue statements of material facts and omissions to state material facts, and (c) engage in transactions, practices and courses of business which would and did operate as a fraud and deceit upon purchasers of Richards stock. The devices, schemes and artifices are not further described; the money and property allegedly obtained is not specified; the persons from whom such money and property was allegedly obtained are not identified; the dates on which such money and property were allegedly obtained are not set forth; the untrue statements of material facts and the facts allegedly omitted are not detailed; and finally, the transactions, practices and courses

of business allegedly operating as a fraud and deceit are not described nor are the purchasers identified who were allegedly deceived and defrauded. (A20)

Paragraph 9 alleges that it was a part of the conspiracy that defendants would devise a scheme and artifice to defraud purchasers of Richards stock and to obtain money by means of false and fraudulent pretenses, representations and promises by the use of the mails. There is no description of the schemes or artifices, no identification of the purchasers to be defrauded or of the money to be obtained nor of the alleged false and fraudulent pretenses, representations and promises. (A20-A21)

Paragraph 10 of the Indictment charges that the defendants in connection with the purchase and sale of Richards stock by the means of interstate commerce and the mails, employed manipulative devices and contrivances. There is no identification of the manipulative devices and contrivances employed or the actions which allegedly constituted manipulation. (A21)

Paragraph 11 is captioned "Means of the Conspiracy", and sets forth certain means by which defendants allegedly carried out the conspiracy.

Subparagraph (a) alleges that between July, 1968 and July, 1970, Duboff and another defendant, Bernard Deutsch (hereinafter "Deutsch") for the purpose of causing the price of Richards stock to rise, caused accounts over which they exercised control or in which they had a beneficial interest to purchase and sell said stock so as to restrict the available supply and to create the appearance of market activity and demand. There is no identification of the accounts or indication of the dates of any transactions. (A21-A22)

Subparagraph (b) charges that Deutsch and Duboff arranged with the brokerage firm of Kelly Andrews & Bradley, Inc. (hereinafter "KAB") to trade Richards as directed by Deutsch and Duboff on condition that KAB pay secret kickbacks in the amount of Thirty (30%) per cent of the net profits resulting from such trading. (A22)

Subparagraph (c) alleges that KAB paid to Deutsch and Duboff approximately Fifteen Thousand ($15,000.00) Dollars in

the form of cash and checks to the Reiss Bank, Zurich, Switzerland. There is no further description of the payments. (A22)

Subparagraph (d) alleges that all of the defendants caused KAB to sell Ten Thousand (10,000) shares of Richards stock, purportedly being offered for distribution to the public, to accounts over which Deutsch and Duboff exercised control or in which they had a beneficial interest. (A22)

Subparagraph (e) alleges that commencing in March, 1969, Deutsch and Duboff, for the purpose of causing the price of Richards stock to rise, induced certain named mutual funds in Denver, Colorado, to purchase such stock from accounts over which they exercised control or in which they had a beneficial interest and other accounts so as to restrict the available supply and to create the appearance of market activity. The accounts are not identified. (A22-A23)

Subparagraph (f) alleges that the manipulative activities of the defendants caused the price of Richards stock to rise from Twenty-Five ($25.00) Dollars to Fifty-Three ($53.00) Dollars a share. (A23)

Subparagraph (g) alleges that Deutsch and Milton Cohen (hereinafter "Cohen"), a third defendant, caused to be filed a false and misleading offering circular in connection with a public offering of 10,000 shares of Richards stock, which failed to disclose; (1) that the offering was not being made to the public but was being offered to and purchased by accounts controlled by Deutsch and Duboff or in which they had a beneficial interest; (2) that Deutsch, Duboff, KAB and Bernard Shwidock, (hereinafter "Shwidock"), a co-conspirator and President of KAB, were underwriters and were receiving compensation for being underwriters; (3) that Deutsch, Cohen and Shwidock had already determined the amount of proceeds at Two Hundred Eighty Thousand ($280,000.00) Dollars, but falsely stated that the proceeds would be determined by the market and could be as high as Three Hundred Thousand ($300,000.00) Dollars; (4) that they would not offer the shares through solicitation by their directors, officers and employees as stated in the offering circular; and (5) that Deutsch and Duboff in return for services to

Richards, including the offering, had received in the past and would receive in the future, compensation, including Richards stock and stock options. (A23-A24)

Counts Two and Three of the Information are substantive charges and allege that defendants by the use of the mails and interstate commerce employed devices, schemes and artifices to defraud, obtained money and property by means of untrue statements of material facts and the omissions of material facts and engaged in transactions which would and did operate as a fraud and deceit upon purchasers. As in the conspiracy count, there is no further specification or description of the charges although in paragraph 2 of that count, the allegations of paragraph eleven of the conspiracy count, which are the allegations described as the "Means of the Conspiracy", are incorporated by reference. Thereafter, certain mailings are set forth all but one of which relate to the mailing of confirmations in connection with the sale of the public offering. The one exception is a letter to KAB from Milton Cohen confirming that KAB is to handle the sale and remit the proceeds to Richards. (Cohen Exh. F) (A2127)

Count Four is also a substantive count and charges the defendants with having transmitted through the mails the false offering circular and sets forth the same alleged falsehoods as are set forth in the Means Paragraph 11(g). (G.E. 5b) (A1750-1765)

The evidence established the following:

Richards, for some years prior to July, 1968, had been engaged in the business of manufacturing hamburger patties and maintained its principal office in Minneapolis, Minnesota. (A118) Its President was Milton Cohen, one of the Appellants. (A117) Sometime prior to July, 1968, Richards caused to be filed with the Securities and Exchange Commission a Notification and an Offering Circular relating to a public sale of One Hundred Thousand (100,000) shares of its common stock pursuant to an exemption from registration provided by Regulation A of the Rules and Regulations of the Securities and Exchange Commission. (A119) The sale was successfully completed and

Richards stock thereupon became a publicly traded security. (A119)

Sometime prior to 1968, Deutsch met Cohen and became interested in assisting in the development of Richards. (A121-A121a) Deutsch, at the time, was a registered representative at Jaffee & Company, a broker-dealer, located in New York. (A893—A894) Duboff was also a registered representative at Jaffee & Company and he and Deutsch operated as partners. (A895)

At about that time Cohen had conceived the idea of developing a chain of franchised fast-food stores on the style of McDonalds which would be a natural customer for Richards' products. (A121-A121a) There was no testimony as to the specific role played by Deutsch but Alvin Malmon, counsel for Richards, testified that in conversations he had with Cohen and with Deutsch, there were discussions of methods of obtaining the needed financing for the franchise operation. (A121a—121b) at some point in the early fall of 1968, it was determined that a small portion of the financing would be accomplished by a $300,000 public offering pursuant to the exemption from registration provided by Regulation A (A121a—121b) Malmon was retained by Richards to prepare the Notification and Offering Circular. (A121c—121d) Malmon testified that in September, 1968, he was instructed by Cohen to grant certain options to Jaffee & Company, Deutsch, Duboff and certain other persons in consideration of services which they had rendered and which they were to render in the future to Richards (A122, A128) He never asked Cohen the nature of the services rendered by the optionees, nor did he advise him that if those services were connected with the underwriting, that fact might have to be revealed in the Offering Circular (A215)

Malmon thereupon commenced the preparation of the Notification and Offering Circular, obtaining the required information either from the prior registration statement or from Cohen. (A121c—A121d) However, Malmon determined what items were material. (A121c) He was advised by Cohen that it was the intention of the Company to act as its own underwriter

and to affect the sale of the securities through officers, directors and employees of the Company. Cohen also told him that Deutsch would help with the sale. (A121c—A121d) However, he was also advised that it was possible that underwriters might be used if the Company was unable to effectuate the sale. (A211)

An Offering Circular was eventually prepared, reviewed with the client, filed with the SEC and it became effective on March 11, 1969. (A121i) The Offering Circular (G.E. 5b) (A1750—A1765) indicated that while the company proposed to act as its own underwriter, it was possible that broker-dealers would be used as underwriters, in which event an amendment would be filed identifying those broker-dealers. The Offering Circular further revealed that Deutsch, Duboff and others were the owners of options to acquire shares of Richards stock which had been received for services rendered to the company.

While the filing was pending with the SEC, certain arrangements were made through Deutsch with KAB in connection with the sale of the securities being underwritten. It is the Government's contention that the role played by KAB pursuant to these arrangements was that of an underwriter. The facts with respect to these arrangements as developed at the trial are as follows:

Shwidock, with whom the arrangements were made and who was named as a co-conspirator, testified that sometime in January 1969, Deutsch advised him that Richards was planning a Regulation A offering and that KAB would be the underwriter. (A363) About one or two weeks later, Deutsch told him that it had been decided that KAB would not be the underwriter but instead it would be an offering by the company. KAB, however, was to send out the confirmations. (A364-A365) Thereafter, in February, 1969, he was introduced to Cohen as the broker who was going to handle the Richards money and they discussed the fact that he was going to send $280,000 as the proceeds of the sale of the stock (A366, A368) About one week later, he asked Deutsch to get him a letter with formal instructions as to whom to send the money to. (A368) Shortly thereafter he had a conversation with Cohen and two days later received the letter

(A369) (Cohen's Exhibit F) (A2127). About 7 to 10 days later, he received Offering Circulars and called Duboff for the names so that he could send out the confirmations. (A371) Duboff told him that since KAB was short 1,000 shares in its trading account it should buy 1,000 shares. (A371)

A few days later on March 18, 1969, he called Duboff for the rest of the names. (A372) Duboff told him to bill Jaffee & Co., for 5,000 shares at $28½, to take 1,000 shares into KAB's trading account and to sell 500 of those shares to A.J. Butler & Co. (A373) On or about April 4, 1969 he called Duboff again about the remaining 3,000 shares. (A377) Duboff told him to sell 1,500 shares to Harry Morganstin and 1,500 shares to William Harris. (A378) Harry Morganstin is Deutsch's brother-in-law. (A1040) and William Harris is Duboff's father-in-law. (A1049) Both of them testified, the latter by stipulation, that Deutsch and Duboff respectively had complete discretion over their accounts. (A1044, A1049)

There was no evidence of any attempt to conceal these purchases and, in fact, the records of the sales were at all times available. Shwidock himself stated that he considered himself a billing agent, not an underwriter since KAB was not selling the stock. (A399-A401) Moreover, as of March 17, 1969, less than one week after the effective date, Malmon knew that KAB was playing a role in the underwriting. On that date Malmon wrote to the transfer agent enclosing a letter from Cohen requesting the transfer of 1,000 shares to KAB. (G.E. 9) (A1774). Thereafter on March 19, 1969, Malmon wrote to the transfer agent to arrange the transfer of the remaining 9,000 shares to KAB. (G.E. 9C) (A1779). While it was understood that KAB was to be compensated for its services in mailing confirmations and offering circulars and in collecting and remitting payment, no formal arrangements were ever worked out. (A365) As a result, KAB obtained its compensation by adding commission on the sales to the mutual fund and to Harris and Morganstin. (A373, A376-A378) Malmon was questioned on cross-examination with respect to the failure to file an amendment to the registration statement identifying KAB as an underwriter.

He admitted that he was aware of the fact that KAB was a brokerage firm and that he should have been put on notice when he received instructions to effect a transfer to KAB that KAB might be an underwriter. (A176—A177) Moreover, he identified a letter from Cohen, dated March 6, 1969, prior to the effective date of the offering as having come from his file. (A168—A170) This letter refers to the fact that KAB will be handling the sale of the shares. (Cohen Exhibit F) (A2127) He had no present recollection of the receipt of that letter. (A168-A170) While he testified that he did not believe, under the circumstances that KAB was an underwriter, he stated that if he had thought about it, he probably would have amended the offering circular (A177-178, A196-A198) For the failure to do so, he accepted full responsibility. (A212-A213) He further testified on cross-examination that he never discussed with Cohen the requirements of identifying an underwriter, (A209-A211) never instructed Cohen to advise him of the manner in which the sale had been conducted. (A211) and never asked any questions of Cohen, at any time, concerning the manner in which the sale of the stock had been effected. (A211) To this day he does not know who sold the shares or what KAB did. (A171) There was not one word of testimony to indicate that had Malmon asked even the most perfunctory questions, he would not have been advised of all of the facts so as to enable him to include appropriate information in an amended offering circular. It should be noted that Malmon had absolutely no conversation at any time with Duboff with respect to the preparation of the offering circular or any other matter. (A205)

Malmon further stated that he did not believe that the omission of any reference to KAB made the Offering Circular misleading. (A192)

The Government in support of its charges that the offering circular was false and misleading introduced over objection the testimony of Ruth Appelton, an attorney with the Securities and Exchange Commission in charge of the Regulation A Division in Washington, D.C. (A518) Appelton testifying as an expert, provided the jury with a dissertation on the legal definition of an

underwriter and her opinion as to the requirements of the law with respect to the information to be included in an offering circular and its materiality. It was her testimony that anybody who participated in any way in the sale and distribution of securities was an underwriter although she admitted after some pressing on cross-examination that one who merely delivered securities or billed customers for payment might not be deemed an underwriter even though he was participating in the distribution. (A521, A585-A587) She further testified that the identity of any person who might be deemed an underwriter was a material fact because a prospective purchaser might be concerned about the reputation of the underwriter or his ability to make a successful offering. The investor would also be interested in the identity of the underwriter, she said, because the underwriter would provide a sort of market place for the securities. (A529) On cross-examination she added that an investor would be concerned that an underwriter would be around helping to support the market which they would do by buying securities in their own account in order to keep the price at a regular level. (A580—A581)

On the other hand, the witness admitted on cross-examination that the listing of a broker as an underwriter, when he has no intention of supporting the market, could also be misleading. (A582)

The witness, then, in response to a series of questions, drew conclusions of law and fact and stated that a broker-dealer who bills purchases, mails out confirmations and transmits proceeds is an underwriter; that a broker-dealer that acquires stock from an issuer in his trading account is an underwriter; that a broker-dealer that obtains shares from an issuer and sells them to a customer is an underwriter; and that a broker-dealer who takes stock from an issuer and transfers it to a third party, charging a commission, is an underwriter. Finally, on redirect in response to a hypothetical question, she testified to her conclusion that if there were 10,000 shares in a Regulation A offering which were handled by a brokerage firm with 2,000 shares being purchased by the firm's trading account, 5,000 being sold for commission

and 3,000 being sold to customers, the brokerage firm would be an underwriter. (A562-A565; A590-A591) All of this testimony was repeatedly objected to, but was admitted despite the fact that even the witness admitted on cross-examination that the questions which she answered were legal questions and that her answers were based upon her interpretation of the provisions of the Securities Act and Regulations.

The testimony relating to the public offering was adduced in support of the allegations of Count Four and also that portion of Count One which charged that the filing of a false offering circular was a part of the conspiracy.

The alleged nexus between the false offering circular and the other aspects of the alleged conspiracy, aside from the identity of persons involved, was the fact that KAB had, prior to the offering, traded Richards stock and that the mutual funds through which a subsequent manipulation was alleged to have occurred had purchased 5,000 shares of the offering.

The facts insofar as the trading activities of KAB is concerned are as follows:

In approximately September, 1968, according to the testimony of Shwidock, KAB commenced business in New York as a broker-dealer. (A329) Shwidock, in a search for business, approached Deutsch and Duboff and requested that they use KAB for the purchase and sale of securities. (A332) According to Shwidock, Deutsch and Duboff, after initially telling him that KAB was too inexperienced for them to do business with at that time, shortly thereafter reversed their position and proposed to him in September or October, 1968 that KAB trade Richards stock pursuant to their directions and remit to them in cash, 50% of the profits derived from such trading in cash. Shwidock testified that he, after consultation with other principals of his firm, agreed to give them 30% of the profits, and thereafter for a period of approximately six months KAB effected transactions in Richards stock at the direction of Deutsch and Duboff. (A332, A333-A340) Shwidock further testified that shortly after these arrangements were made, Deutsch and Duboff called him to their office and he was introduced to Jack Reiss who was

described as the President of the Reiss Bank, a Swiss Bank. (A342-A345) He was told that the Reiss Bank was a substantial customer and it was suggested that he subscribe to an investment advisory service from the Reiss Bank for $10,000 per month which he could charge off against the 30% payments he was to make to Deutsch and Duboff. (A342-A345) Shwidock then stated that profits of approximately $50,000 were earned in trading Richards stock of which he paid $15,000 to Deutsch and Duboff. (A360) He was then allowed over objection, to identify six $15,000 checks payable to the Reiss Bank over a period of one year. (A350) G.E. 24A-E) (A1862-A1871) The court in an attempt to avoid prejudicial error instructed the jury that the defendants were not charged with having received the $90,000 in checks, that there was no evidence before them that any portion of the $90,000 was conveyed to either Deutsch or Duboff and that the government was introducing the checks merely as some proof of what it regards as one means by which the defendants obtained part of the $15,000. (A397) Shwidock also testified that he paid for some paintings for Duboff and some clothing for Deutsch, at their request, which was charged against the payments they were to receive. (A353)

This testimony was admitted on the theory that the trading by KAB pursuant to direction from Deutsch and Duboff was a part of a manipulation and that the payments to Deutsch and Duboff established a motive for the manipulation.

It is Duboff's position that nothing in Shwidock's testimony established a manipulation and that even if believed fully, the testimony established no more than that Deutsch and Duboff may have improperly received a share of KAB's trading profits. That testimony will be examined in more detail hereafter during the course of the argument. In substance, it established that KAB made a market for a period of time in Richards stock by submitting bid and asked prices in the pink sheets. These prices were fixed after consultation with Deutsch or Duboff who, on some occasions, indicated agreement with the proposed prices and on others suggested either a lowering or a raising of the price. Shwidock and others testified, however, that the prices

submitted in the pink sheets are of relatively limited significance accomplishing no more than to advise other brokers of their interest in the stock and in rather general terms of the prices at which they would buy or sell. Having become a market maker, Shwidock testified that, from time to time, he received a telephone call from Deutsch or Duboff advising him to effect either a purchase or a sale of Richards stock with another brokerage firm at a designated price.

Shwidock then called the other brokerage firm to confirm the purchase or sale. (A333—A340) There was no testimony as to the nature of the transactions, how they were negotiated or how the price was arrived at. There was not one word of testimony to indicate that any of these sales or purchases were not completely bona fide or that any sale or purchase was effected with the intent or had the effect of raising or supporting the price of Richards stock.

On cross-examination Shwidock testified that Jaffee & Company did not make a market in Richards stock and that accordingly, Jaffee would, as did other brokerage houses, use a firm like KAB to obtain or sell stock. He testified that it was a common practice for brokerage firms interested in buying or selling stock of a company to inquire of a firm like Jaffee & Company as to where Richards stock could be obtained or sold because it was well known that Jaffee & Company had taken an active interest in that stock. Jaffee & Company could not purchase the stock or sell the stock directly because it was not making a market in Richards. (A414—A416)

Although Shwidock was named as a co-conspirator, he testified that he did not believe that he was doing anything improper when he handled these transactions. (A418) Deutsch or Duboff never told him to pay more for stock than the best price he could get and when they requested him to sell at a particular price, they thought that was the best price they could get. (A421)

During cross-examination, details were developed with respect to the nature and extent of KAB's trading activities and the prices at which those activities were conducted. (A447-A462)

This testimony, which was based upon the records of KAB, revealed that from September 13, 1968 through March 14, 1969, the total number of Richards shares purchased by KAB was 16,200 and the total number of shares sold was approximately 14,000. (A446-A461) Ten thousand of the shares which were purchased and sold consisted of two 5,000 share blocks purchased from Jaffee & Company at $28 which was three points below the market and sold almost immediately at $31. (A447-A449) Of this 10,000 share sale, 8,500 shares were sold to three large reputable brokerage firms, i.e., A.G. Becker & Company, Dreyfoos, Ellis & Company and Mayer & Schweitzer. (A451) There was no testimony to indicate even the slightest impropriety in this transaction. If the 10,000 share purchase and sale is eliminated, the record reveals that during the six month period involved only 6,200 shares were purchased. Nine Hundred of them were purchased during September, 1968, at prices of $30 and $31 and sold at approximately the same price. (A446-A447) Only One Hundred shares were purchased in November. (A456) Twelve Hundred shares were purchased in December at prices of $27 and $28 between two and four points lower than the prices paid in September (A457). Three Thousand shares were purchased in January, 1969 at decreasing prices ranging as low as $21 and $22 a share. (A459-A460) Between February 1st and February 25th, approximately 1,000 shares were purchased at prices ranging from $30 to $35 although by February 25th until March 14th, the day of the first sale of the public issue, there were no purchases by KAB. (A460-A462) There was no testimony with respect to these transactions other than as set forth above. Certainly, there was no evidence to indicate that any of these purchases were not bona fide purchases at prices negotiated at arm's length or that they were intended or had the effect of increasing or supporting the price of the stock. As a matter of fact, Shwidock testified with respect to the 10,000 share sales, that a sale of such a large block would have a tendency to cause a drop in the price and that one did not expect to push the price up in that fashion. (A450) He further testified that the fact that such a large block could be sold indicated a

substantial demand for the stock. (A450) At this point it should be noted that despite its burden to establish a manipulation, no effort was made by the Government to establish the extent of the trading in Richards stock during this period by any other brokerage firms.

While Shwidock testified that approximately $50,000 in profits was realized by KAB as a result of the trading activities in the stock, of which 30% or $15,000 was paid to or for the benefit of Deutsch and Duboff, $45,000 of this profit resulted from the purchase and sale of two 5,000 share blocks. (A455) Defendants repeatedly objected to Shwidock's testimony about the alleged sharing of profits from the trading account on the ground that such testimony was in no way related to the charges in the case. The court, however, admitted the testimony on the theory that it tended to establish a profit motive for defendants to manipulate the stock. It is defendant's position that this testimony was completely irrelevant and highly prejudicial.

As was set forth earlier, 5,000 shares of the public offering were acquired by a mutual fund in Denver, Colorado known as the Financial Venture Fund. (A616) After the public offering, that fund and two other funds managed by the same management company, Financial Dynamics Fund and Financial Industrial Fund, purchased approximately $5,000,000 in Richards stock over the next twelve months acquiring by purchase and stock dividends approximately 75% of all of the publicly traded shares. (G.E. 49) (A1189-A1893). Each fund was controlled by a different portfolio manager. (A604-A605)

It was the contention of the Government that the funds were induced to make these purchases by Deutsch and Duboff as part of the a conpiracy to restrict the supply of the stock and to create market activity in order to push up the price of the stock. (A10) The Government contended that John Hurley (hereinafter "Hurley"), the portfolio manager of Financial Venture Fund, was a co-conspirator in this conspiracy (A19), and that this alleged manipulation was part of an overall conspiracy which included the trading activities of KAB and the filing of a false Offering Circular. (A20) In support of its contentions, the

Government introduced the following evidence.

Hugh Deane (hereinafter "Deane"), also an alleged co-conspirator, a stockbroker with Wood Walker & Company, testified, over objection, that he met Deutsch in the fall of 1968 at a time when he was the owner of shares of Richards and interested in learning about the company. (A236) After a preliminary conversation with Deutsch, he called Deutsch at his office to inquire among other things about Deutsch's opinion as to Richard's future earnings. (A237-A238) Deutsch told him, he says, that he expected Richards to earn $2.50 a share in two years and $5.00 a share in three years. (A237-A238)

Sometime thereafter, Deane commenced purchasing stock for some of his customers. (A249) This testimony was objected to on the ground that it was irrelevant and was obviously offered for the purpose of attempting to establish a misrepresentation. Although no charge in the indictment related to such a misrepresentation, the court overruled the objection.

Deane then testified about a meeting with Hurley, in the fall of 1968. (A252) Hurley, he said, was the portfolio manager of Financial Venture Fund, a new fund being formed with approximately $45,000,000 for investment in small, high-risk new companies. (A252-A253) Although there is some confusion as to whether the names Deutsch and Jaffee & Company were first brought up by Deane or by Hurley, the substance of the conversation related to the success that Jaffee & Company and Deutsch had experienced with the stock of small new companies and the desirability of a meeting between Hurley and Deutsch since Hurley needed to locate investments for the $45,000,000. (A255-256).

Hurley testified that based upon information which he had received about Deutsch, he communicated with Deutsch and arranged a meeting in Denver in late February, 1969, with Deutsch for the purpose of discussing investments. (A606-607) At this meeting Deutsch told him about several stocks including Richards in which Deutsch was interested and indicated that he thought Richards was a good investment. He told Hurley that he anticipated earnings of $2.50 per share and $5.00 per share in

two and three years respectively and indicated that Richards was engaged in developing a franchise concept for fast-food restaurants using a Circus Wagon motif and that approximately 50 or 60 franchises had already been sold. (A609-A610)

Deutsch also told him subsequently about the 10,000 share offering and advised him that he would be able to purchase 5,000 shares of that offering which he agreed to. In April or May, 1969, Hurley met Cohen and discussed the future of Richards with him. (A618) Hurley was very impressed with Cohen and told Deutsch he was interested in all of the stock Deutsch could show him. (A620-A621) Over a six month period, Hurley's fund purchased approximately $1,500,000 of Richards stock. (A1889-1893) (G.E. 49).

Hurley provided no further evidence as to how or why he made any purchases of Richards stock nor did he discuss any further conversations with Deutsch or Cohen about those purchases.

He denied on cross-examination any intent improperly to affect the price of Richards stock and although he was named as a co-conspirator, he denied that he had ever agreed with anybody to attempt to manipulate the price of the stock. (A766) When questioned about purchases of more than $3,000,000 by the two other mutual funds, Hurley stated that although he was generally aware at various times that substantial purchases were being made by those two funds, he never had any conversations with the portfolio manager of those funds about their purchases and was not aware in any detail of the nature or extent of those purchases. (A753)

Confronted with a complete lack of evidence that Deutsch had induced the funds to purchase stock or that those purchases had been made pursuant to any agreement or understanding that the funds would purchase a large portion of the available supply in order to drive the price of the stock up, the government, during trial, conceived the theory that the funds were induced to make purchases by false representations made to them by Deutsch and by Cohen.

Over objection by defendants, evidence was introduced in

the form of press releases issued by Richards setting forth information with respect to the Company. (G.E. 31A-31E) (A1876-1880)(G.E. 25G)(A1881).The information contained in these press releases, with one possible exception, was completely innoccuous and at most expressed some optimism about the future of Richards. One release, issued on April 6, 1970 did refer to the fact that 210 franchises had been sold which the government contended was false. (G.E. 25G) (A1881). It should be noted, however, that by April 6, 1970, virtually all of the fund purchases had been completed. (G.E. 49) (A1889-1893).

James Giasafakis, an analyst employed by the mutual funds, testified that he recalled seeing four of these press releases and that they were distributed to all portfolio managers. (A853) Giasafakis also testified that there were frequent informal conferences among the portfolio managers during the course of which Hurley would refer, among other things, to telephone conversations with Deutsch in respect to Richards. Giasafakis, however, was unable to specify any item which was brought up during those conversations. (A859) From this evidence, the government, with the court's blessing, contended that the inference could be drawn that the information contained in these press releases and the conversations among the portfolio managers relating to information from Deutsch was the inducing cause for the purchases, not only by Hurley's fund but by the other two fund managers. (A1261-A1262) Certain other areas of alleged misrepresentation will be discussed hereafter.

In refutation of the inferences sought to be drawn from this rather vague testimony, Duboff offered in evidence a schedule based upon the purchases orders by the funds. (Duboff's Exhibit Y) (A2177-A2190). An analysis of these schedules reveals a course of conduct which not only fails to indicate a manipulation but on the contrary, indicates a course of conduct clearly designed to minimize any impact on the price of the stock resulting from substantial purchases. These charts will be analyzed in greater detail during the course of the argument.

In a further attempt to establish that the purchases by the mutual funds were part of a manipulative scheme, testimony was

adduced from Fred Mazzeo, a trader associated with V.F. Naddeo & Company through whom a substantial number of purchases were made by Deutsch and Duboff for the purpose of filling purchase orders of the mutual funds. Mazzeo testified that Deutsch and Duboff in connection with their purchases of Richards stock placed orders with him and from time to time with respect to a few of these orders, indicated that stock was available at certain brokerage firms. (A1016, A1031-A1038) Nothing in his testimony indicated that any of the transactions were other then bona fide sales at negotiated prices or what relationship those prices bore to the prices being paid by others. Moreover, on cross-examination, Mazzeo testified that it would be normal for a firm like Jaffee & Company, when it had substantial purchase orders, to have those orders filled by a trading firm like V.F. Naddeo in order to avoid pushing the price up and in order to be able to get the best possible price. He stated that the common knowledge that Jaffee & Company was interested in purchasing substantial amounts of stock, which would result from their seeking out stock, would cause the price to rise. (A1006-A1007) He stated further that were Jaffee & Company to seek to purchase stock directly from other brokerage firms, it would be required to purchase at the offering price which is usually two to three points higher then the bid price. (A1011) On the other hand a trading house like V.F. Naddeo would be able, by merely raising its bid ¼ to ½ points, to purchase stock at slightly above the bid, and acquire stock for Jaffee & Company at a saving of two or more points on the purchase price. (A1004-A1005) (A1010)

Mazzeo was also identified as a co-conspirator and he too denied that his activities were in any way improper or that he ever participated in an agreement to manipulate the price of Richards stock. (A1012-A1013, A1024-A1025)

As additional evidence of an alleged manipulation, trading records were introduced of Allesandrini & Co. (G.E.86) (A2021-2032) which indicated purchases by Allessandrini & Co. from V. F. Naddeo & Co. and resales to Jaffee & Co. These sales occurred after Deutsch and Duboff discontinued doing business

with V.F. Naddeo & Co. (A989) Even though there was absolutely no oral testimony about these transactions, the evidence was admitted, over objection, on the court's theory that when brokerage houses trade back and forth with prices rising, you have the creation of activity. When it was pointed out to the court that the prices had fallen, the court said the purpose of the manipulation could be to keep the price from slipping. (A1198-A1199) Defendants of course were never charged with attempting to keep the price from slipping and in any event there was not one single word to indicate any impropriety with respect to any of the Allessandrini & Co. transactions.

As further proof of the alleged manipulative scheme, testimony was introduced of Somer Jack Rothman, a bookkeeper for New Dimensions Securities, Inc., (hereinafter "New Dimensions") a brokerage firm, with respect to transactions in Richards stock. Rothman testified to conversations with Deutsch and Duboff in which he was advised that New Dimensions was selling Richards stock to Jaffee & Company at specific prices and that New Dimensions was purchasing these shares of stock from other specified brokers which he confirmed by telephone calls to those other brokers. (A1072) He did not testify as to the relationship between the price paid in these transactions and the then market price of the stock or to the prices being paid by other brokers. There was no evidence indicating that these transactions were not bona fide. Moreover, his testimony was contradicted by the fact that until April 9, 1970, by which time almost all the transactions had already taken place, New Dimensions constantly had a short position in the stock. (A1131) Great emphasis was placed by the government on the fact that New Dimensions earned substantial profits on these transactions, virtually all of which were entered into for the purpose of filling purchase orders by the mutual funds. (G.E. 49) (A1889-1893).

The government contrasted the two or three point profit made by New Dimensions on most of its transactions with the 1/4 to 1/2 point profit made by V.F. Naddeo & Co. However, on most occasions New Dimensions' sales to Jaffee were short sales

and their profits resulted from their ability to purchase the stock thereafter at lower prices. As explained by Mayer, a trader who testified as an expert for the defendants, a trading house anticipates receiving a much higher profit when it sells short because it is in a risk situation as opposed to a situation in which it is merely purchasing against an order. (A1400-A1401)

Defendants objected to all of this testimony on the ground that all of the purchases from New Dimensions were for the two funds with which Hurley was not involved and there was no evidence that any defendant had anything to do with the decisions by those funds to buy a stock.

As in the case of KAB, the government then introduced, over vigorous objection, substantial testimony of a highly prejudicial nature for the purpose of establishing that Deutsch and Duboff had a direct or indirect interest in New Dimensions as a result of which they would personally profit from its business activities. The purpose of the testimony was to establish a motive to manipulate. The testimony, which will be discussed during the course of the argument was so extensive and of such a highly prejudicial nature that whatever limited probative value it had was substantially outweighed by the prejudice.

It is now proposed to discuss the testimony adduced at the trial with respect to alleged misrepresentations. As had been earlier indicated, the Indictment nowhere specifies what misrepresentations were made other then in connection with the Offering Circular. Despite this fact and despite constant, continuing objections by defendants, a plethora of testimony was admitted by the court dealing with representations alleged to have been misleading and facts alleged to have been omitted. Various theories were presented by the government in support of the admissibility of this evidence and various grounds were held by the court to be a basis for its admissibility. However, no limiting or clarifying instructions were given to the jury and, with but one exception, all of the testimony was submitted for the jury's consideration and could have constituted a basis for the jury to find either a misrepresentation of or an omission to state material facts. It is Duboff's position that all of this evidence

with respect to misrepresentation was improperly admitted because of the indictment's lack of specificity. Furthermore, Duboff contends that the evidence failed to establish insofar as he is concerned, any knowing participation in any misrepresentation.

The testimony of Hugh Deane with respect to alleged representations made to him has already been discussed as has the testimony of Hurley. In addition, the following evidence was admitted with respect to alleged misrepresentations and misleading statements.

A report by one Michael Papworth (Deutsch Exhibit A) (A2191-A2197) was introduced in evidence indicating among other things that Richards had made an acquisition of a company known as F & T Meat Company. Papworth was a young analyst employed by a fund management company in California. (A770) The report was prepared by him for the experience after a meeting with Deutsch and Cohen. (A777) A copy of the report was sent to Deutsch who said the report was good (A779) A copy was given to Hurley by Deutsch. (A627-628)

Oscar Feldhamer, the President of F & T Meat Company, was called to testify that although there was discussion about the sale of his company for 20,000 shares of Richards stock and although there might have been an understanding that there was a deal, because he wanted cash instead of stock, the deal was never consummated and no agreement was ever signed. (A796-A800) He conceded on cross-examination that his brother was conducting the negotiations and that there was an intention to effect a sale. (A802)

His brother, David Feldhamer, was called as a defense witness and testified that an agreement had been reached between the parties but that his brother Oscar later changed his mind and that the deal was called off. (A1316-A1319) There was no testimony that Duboff played any role in these negotiations, that Duboff spoke with or even knew of Papworth or his report or that Duboff had any knowledge that the report was given to Hurley.

James Giasafakis, an analyst with the mutual funds,

testified that he had a conversation with Deutsch in Minneapolis, Minnesota in July, 1969 during the course of which Deutsch told him that more then 200 franchises had been sold. (A845) Testimony was subsequently adduced by the government which will be discussed hereafter for the purpose of establishing that at that time substantially fewer then 200 franchises had been sold.

Testimony was also offered by Joseph Kally, who was in charge of the real estate arm of Richards commencing in September, 1969. (A898-899) Kally testified that franchisees were angry over delays (A901-A902, A917); that in May, 1970, they cancelled a Detroit franchise agreement for 5 units. (A920-A921); that in March, 1970, they cancelled a Los Angeles agreement for one unit (A923-A924); that in April or May, 1970, they cancelled a Puerto Rican agreement (A925-A926) and that in May, 1970, Cohen told a group of franchisees that Richards was financially sound. (A927-A929) Kally also identified a schedule admittedly not complete of franchises sold as of February 13, 1970. (G.E. 65) (A1894).

This testimony was admitted on the government's theory that the defendants, as part of a fraudulent scheme, knowingly omitted to advise the public of the difficulties being faced by Richards. Of course, there was no reference in the Information to such a charge. Again, there was no testimony that Deutsch or Duboff were aware of the difficulties being faced by Richards, if indeed they were required to be revealed publicly nor was there any evidence that Duboff played any role in the issuing of press releases by Richards.

Further testimony was introduced to establish that on various occasions Deutsch and/or Cohen advised various people that Richards would have sufficient financing available to build the restaurants because they had substantial loan commitments. (A605, A627, A907) There was no testimony that such commitments did not exist but the government contended that an inference could be drawn that no such commitments ever existed because no such loan was ever obtained.

There was no testimony that Duboff ever made such

statements, was present when they were m[illegible] or had any knowledge that they were made.

Another area in which defendants are alleged to have misled the public related to the financial report for Richards for the year ending June 30, 1969. It was the government's contention, although nowhere alleged in the Information that this financial report which was not issued by the accountants until April, 1970 was intentionally delayed in order to conceal from the public the financial condition of the company. There was no evidence during the government's direct case to support this position other than an inference to be drawn from the fact that the report was not issued until April, 1970. Defendants introduced the testimony of Willia[illegible]ouder, a partner of Coopers & Lybrand, the accounting firm which prepared the report. (A1341—A1343) He testified that the audit was commenced prior to June 30, 1969. (A1343) The accountant's field work was not completed until December 29, 1969 because Richards was a new company which had never been audited before which created problems in computing beginning inventories, posting books up-to-date and also because of the complex accounting problems resulting from acquisitions. (A1344-A1352) After December, 1969, they were further delayed by problems in determining when to recognize income from the sale of franchises and in bringing the figures up-to-date. (A1353-A1355) He made it absolutely clear that the delay had not been intentional and had not been caused by anything other than audit problems. In addition, Cohen's secretary testified that she was instructed to mail the reports the moment they were received and that they were in fact mailed on the day they were received at Richards' offices in April, 1970. (A1266) In any event, there was no testimony indicating that Duboff or Deutsch had any knowledge of or connection with the audit or the determination of when the annual report was to be mailed.

Finally, there was testimony by Gerald O'Meara, an employee of Value Line Investment Fund with respect to representations made to him about earning projections and the sale of franchises in connection with a private placement made

with Value Line in April, 1969 in the amount of $1,400,000. (A870-A877) This is the only representation as to which the court charged the jury that they were to consider it only for purposes of background. (A1599)

ARGUMENT

POINT ONE

THE INSUFFICIENCY OF THE CHARGES REQUIRES DISMISSAL OF THE INDICTMENT

It is Duboff's position that Counts One, Two and Three of the Information fail adequately to apprise him of the nature of the charges against him and, therefore, should be dismissed. Duboff further contends that a dismissal of Counts One, Two and Three requires a dismissal of Count Four since by virtue of the court's charge, the jury was permitted to convict Duboff solely on the basis of a finding that he was a member of the conspiracy charged in Count One. The court charged the jury that they could find the defendants guilty on each of the substantive counts even if not satisfied as to a particular defendant that each of the elements of the crime had been proved beyond a reasonable doubt if the jury found that the substantive offenses were committed by members of the conspiracy, that the defendant was a member of that conspiracy and that the acts were done in furtherance of that conspiracy. (A1609-A1610).

Rule 7 (c) of the Federal Rules of Criminal Procedure requires that every indictment contain "a plain, concise and definite written statement of the essential facts constituting the offense charged".

Even before the adoption of Rule 7(c), the courts had long held that an indictment must contain sufficient particulars to advise the defendant of the nature of the charge being made against him. See *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038 (1962); *United States v. Hess*, 124 U.S. 483, 8 S. Ct. 571 (1888); *Ex Parte Bain*, 121 U.S. 1, 7 S. Ct. 781 (1887); *United States v. Silverman*, 430 F. 2d. 106 (2d. Cir., 1970).

It is apparently the position of the government that the requirements of Rule 7(c) and of the cases is satisfied by setting forth the charge in the language of the statute without the inclusion of any specific details of the charges.

This argument distorts the decisions upon which it is based and ignores decisional law of the courts of this Country dating back to the decision of the Supreme Court in 1888 in *United States v. Hess*, 124 U.S. 483, 8 S.Ct. 571. In that case the defendant had been charged in the language of the statute with "having devised a scheme to defraud divers other persons to the jurors unknown" by inducing such other persons to communicate with him through the post office. The court dismissed the indictment as insufficient. In rendering its decision, the court stated at page 573:

> "The statute upon which the indictment is founded only describes the general nature of the offense prohibited; and the indictment, in repeating its language without averments disclosing the particulars of the alleged offense, states no matters upon which issue could be formed for submission to a jury. The general, and with few exceptions, of which the present case is not one, the universal, rule, on this subject, is that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication, and the charge must be made directly, and not inferentially, or by way of recital. The statute is directed against "devising, or intending to devise, any scheme or artifice to defraud," to be effected by communication through the post-office. As a foundation for the charge, a scheme or artifice to defraud must be stated, which the accused either devised, or intended to devise, with all such particulars as are essential to constitute the scheme or artifice, and to acquaint him with what he must meet on the trial.

The averment here is that the defendant, 'having devised a scheme to defraud divers other persons to the jurors unknown,' intended to effect the same by inciting such other persons to communicate with him through the post-office, and received a letter on the subject. Assuming that this averment of 'having devised' the scheme may be taken as sufficiently direct and positive, the absence of all particulars of the alleged scheme renders the count as defective as would be an indictment for larceny without stating the property stolen, or its owner or party from whose possession it was taken.

The doctrine invoked by the solicitor general, that it is sufficient, in an indictment upon a statute, to set forth the offense in the words of the statute, does not meet the difficulty here. Undoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged."

See also *United States v. Cruikshank*, 92 U.S. 542 (1875).

As recently as 1962 the Supreme Court reaffirmed this requirement of sufficiency in *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038 (1962), stating at page 1047:

"It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to particulars.' " *United States v. Cruikshank*, 92 U.S. 542, 558, 23 L.Ed. 588. An indictment not framed to apprise the defendant 'with reasonable certainty of the nature of the accusation against him . . . is defective, although it may follow the language of the statute.' *United States v. Simmons*, 96 U.S. 360, 362, 24 L.Ed. 819. 'In an indictment upon a statute, it is not sufficient to set forth

> the offense in the words of the statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; * * *.' *United States v. Carll*, 105 U.S. 611, 612, 26 L.Ed. 1135. 'Undoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." *United States v. Hess*, 124 U.S. 483, 487, 8 S.Ct. 571, 573, 31 L. Ed. 516. See also *Pettibone v. United States*, 148 U.S. 197, 202-204, 13 S.Ct. 542, 545, 37 L.Ed. 419; *Blitz v. United States*, 153 U.S. 308, 315, 14 S.Ct. 924, 927, 38 L.Ed. 725; *Keck v. United States*, 172 U.S. 434, 437, 19 S.Ct. 254, 255, 43 L.Ed. 505; *Morissette v. United States*, 342 U.S. 246, 270, n. 30, 72 S.Ct. 240, 253, 96 L.Ed. 288. Cf. *United States v. Petrillo*, 332 U.S. 1, 10-11, 67 S.Ct. 1538, 1543, 91 L.Ed. 1877. That these basic principles of fundamental fairness retain their full vitality under modern concepts of pleading, and specifically under Rule 7(c) of the Federal Rules of Criminal Procedure, is illustrated by many recent Federal decisions."

It would appear that these decisions utterly destroy the government's contention that in this case a charge in the language of statute is sufficient. Not only was Duboff not informed of all of the facts and circumstances constituting the specific offense with which he was charged, he was informed of virtually no facts and circumstances.

The charging paragraphs of Count One, the conspiracy count are paragraphs 6 through 11. Paragraph 6 merely alleges generally that the defendants conspired to violate various sections of the law and can hardly be deemed to have advised Duboff of anything.

Paragraph 7 alleges merely that it was a part of the con-

spiracy to mail false and misleading offering circulars. It is not alleged in what respect the offering circulars are deemed to have been false and misleading. It is conceded that Paragraph 11(g), identified as the means by which the conspiracy was effectuated, if read in conjunction with this charging paragraph, at least to the extent therein stated could be deemed to advise defendant of some of the charges against him. However, defendant should not have to speculate and the charges against him should be set forth clearly and directly.

Paragraphs 8, 9 and 10, which are the remaining charging paragraphs of Count One, charge in the exact language of the statute that the defendants employed devices, schemes and artifices to defraud, that they obtained money and property by means of untrue statements of material facts and omissions to state material facts, that they engaged in fraudulent transactions, practices and courses of business which defrauded the purchasers of Richards stock, that they devised schemes and artifices to defraud purchasers of Richards stock and to obtain money by false and fraudulent pretenses, and that they employed manipulative devices and contrivances. Not one specific fact is set forth within this generic description of the crime. The language is almost identical to the language which was condemned by the Supreme Court in the *Hess* case, *supra* and the *Russell* case, *supra.*

Nor, despite protestations to the contrary by the government, do the sub-paragraphs of paragraph 11, the "Means of the Conspiracy", add anything to the language of paragraphs 8, 9 and 10. Thus, sub-paragraph (a) of paragraph 11 states that defendants Deutsch and Duboff, for the purpose of causing the price of Richards stock to rise, caused accounts which they controlled or in which they had a beneficial interest to purchase and sell the stock so as to restrict the available supply and create the appearance of market activity. Which of the several general charges this is supposed to qualify is nowhere set forth. Nor is there any identification of the accounts allegedly controlled by these defendants or in which they had a beneficial interest, nor is there any indication of when and where the alleged purchases or

sales of the stock occurred.

Sub-paragraph (b) merely alleges that Deutsch and Duboff directed the trading of the brokerage firm of KAB in return for secret kickbacks. In what respect does this qualify any of the allegations of paragraphs 8, 9 and 10? Is this a scheme to defraud? Is it an artifice or device? Is it a manipulative practice? Is it connected with a misrepresentation? None of this information is set forth in any way.

Sub-paragraph (c) alleges that KAB, in fact, paid kickbacks to Deutsch and Duboff, an allegation which adds nothing to sub-paragraph (b).

Sub-paragraph (d) alleges that defendants caused KAB to sell 10,000 shares of Richards stock to accounts controlled by Deutsch and Duboff, or in which they had a beneficial interest. Not one word is included to indicate in what respect that conduct is alleged to have constituted a crime or which general paragraph of Count One it is alleged to qualify. Moreover, the accounts are not identified and the date of the sales are not set forth.

Sub-paragraph (e) is the only paragraph which could be deemed to set forth any specific charge, and that sub-paragraph is limited to the charge that Deutsch and Duboff induced the mutual funds to purchase stock in order to restrict the available market supply and to create the appearance of market activity. To that limited extent, it is conceded that sub-paragraph (e) may correct the deficiencies of paragraphs 8, 9 and 10.

Sub-paragraph (f) contains no information, and sub-paragraph (g), as has been indicated earlier, may be sufficient to charge the filing or a conspiracy to file a false and misleading Offering Circular.

Counts Two and Three for all intents and purposes are virtually identical to the corresponding paragraphs of Count One and are equally deficient in alleging specifics. In substance, they do no more than to incorporate portions of Count One by reference.

In paragraph 1 of both of those counts, defendants are charged in generic statutory terms with employing devices, schemes and artifices to defraud; obtaining money on the basis

of untrue statements of material facts and omissions to state material facts; and engaging in transactions, practices and courses of business which operated as a fraud and deceit upon purchasers of Richards stock.

The essential facts constituting the alleged offenses are nowhere to be found. The Information does not tell the defendant:

1(What devices, schemes or artifices were allegedly used,
2) What fraud resulted from their alleged use,
3) What money or property was allegedly obtained,
4) What untrue statements of what material facts were allegedly made,
5) What omissions allegedly occurred,
6) What transactions, practices and courses of business were allegedly employed, and
7) What fraud and deceit allegedly resulted.

The Information then states, in paragraph 2 of Counts Two and Three, that the allegations contained in the means section, paragraph 11, of Count One constitute the offenses charged. Paragraph 11, and particularly subsections (b), (c) and (d), do not allege criminal activities but merely list events that allegedly occurred and were the alleged means to carry out the aspects of the conspiracy described in paragraphs 6 and/or 7 and/or 8 and/or 9 and/or 10 of Count One.

In this connection, it is interesting to note that by incorporating paragraph 11 by reference, the Information implicitly charges that the means listed in paragraph 11 relate solely to paragraph 8 of Count One, which is the conspiracy counterpart to Counts Two and Three. Inconsistencies such as this only highlights the confused, ambiguous nature of the charges and the virtual impossibility of preparing an adequate defense.

As the United States Supreme Court stated in *United States v. Hess, supra,* these allegations are as defective as would be an indictment for larceny which fails to identify the stolen property or the victim.

Count Four, standing by itself may be adequate to charge a

crime. However, in view of the court's charge, Duboff, as well as the other appellants could have been convicted solely on the basis of a finding of guilt as to Count One. Therefore, if Count One is deemed to be subject to dismissal, the conviction on Count Four cannot stand.

Where, as here, the statutory definition of the offense is very broad and includes generic terms, an indictment is insufficient which charges the offense only in the same generic terms. The indictment must be specific and describe the offense by setting forth particulars. See *Russell v. United States, supra; United States v. Cruikshank, supra; United States v. Simmons,* 96 U.S. 360 (1877).

> "The general rule in reference to an indictment is that all the material facts and circumstnaces embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly, and not inferentially, or by way of recital."

Pettibone v. United States, supra, 13 S. Ct. at page 545.

The broad and generic charges of Counts One, Two and Three of this Information are completely inadequate and useless to Duboff in preparing his defense. The absence of factual particulars of the alleged scheme or fraud or misrepresentations which was the reason for the United States Supreme Court's dismissal of the indictment in *United States v. Hess, supra,* is likewise a basis for dismissing Counts One, Two and Three of this Information.

Indictments, or the insufficient portions, have been consistently dismissed, as in *United States v. Hess, supra,* for their failure to describe the details and particulars of alleged schemes, devices, artifices, transactions, practices and courses of business, frauds, falsehoods and omissions, misleading statements, pretenses, representations, promises, contrivances and manipulations.

This court very recently had occasion to consider this issue in the case of *United States v. Zeehandelaar,* 498 F.2d. 352 (2d.

Cir. 1974). In that case this court reversed a conviction on the ground that the indictment failed to apprise the accused with reasonable certainty of the nature of the accusation against him. In that case, the only issue was the truthfulness of a statement in the application with respect to the existence of a contract on a particular date. The indictment was held insufficient because it was unclear and confusing to the court and jury precisely which of two possible contracts was referred to. The court in a footnote at page 356 set forth with great clarity all of the reasons why an indictment must be clear and definite and stated:

> "An indictment drawn with reasonable certainty assures that the defendant will not be tried or convicted for an offense other than the one for which he was indicted by the grand jury, that the defendant will be able to prepare an adequate defense and to address himself to the relevant questions of fact and law, that the trial court will be able to determine that the jury's verdict rests on substantial evidence, that an appellate court's affirmance will not be for a crime other than the one for which defendant was convicted, and that the defendant will not face the prospect of being placed twice in jeopardy."

All of the reasons set forth by the court apply even more strongly in this case where the defendants were called upon to defend against a whole range of charges of alleged misrepresentations, fraudulent acts and manipulative acts, almost none of which were identified in any way in the indictment.

The confusion was so great that even at this time it is not clear precisely what it is that defendants were convicted of.

The deficiencies in the indictment and the difficulties resulting therefrom are highlighted by the court's charge to the jury which stated with respect to misrepresentations, in effect, that the government had charged many misrepresentations and that if the jury found any misrepresentation, it could convict. Similarly, the court charged that if the jury found a scheme to defraud, not otherwise described in the court's charge, it could

convict. Further reference to the charge will be made hereafter.

Factual insufficiency of the charges caused the court in *United States v. De Sapio,* 299 F. Supp. 436 (S.D. N.Y., 1969) to dismiss the paragraph of the conspiracy count charging the defendant with:

> ". . . having devised a scheme and artifice to defraud the people of the City of New York and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, for the purpose of executing such scheme and artifice would place and cause to be placed in post offices and authorized depositories for mail, matters and things to be sent and delivered by the United States Post Office Department . . . "

As in Counts One, Two and Three of our Information, only insufficient skeletal allegations in generic terms were provided.

In *United States v. Russell, supra,* the Supreme Court cited and agreed with the holding of *United States v. Apex Distributing Company,* 148 F. Supp. 365 (D. Rh. Isl., 1957) where, like the present case, the defendant was not sufficiently informed of the charges, and the court dismissed Count I B. and Counts IV and V of the indictment which read as follows:

> "Count I: '* * * Apex Distributing Company, Inc. * * * did wilfully, knowingly and unlawfully conspire, combine, confederate and agree together and each with the other. * * *
>
> 'B. 'To commit certain offenses against the United States, to wit:
>
> '1. The crime of bribery in violation of Title 18, United States Code, Section 201;
>
> '2. The crime of knowingly making false statements and entries in violation of Title 18, United States Code, Section 1001;
>
> '3. The crime of knowingly and fraudulently obtaining from the United States moneys in excess of $100 by means of false and fictitious invoices in violation of Title 18, United States Code, Section 1003;

'4. The crime of knowingly making false, fictitious and fraudulent claims upon and against the United States in violation of Title 18, United States Code, Section 287;

'5. The crime of knowingly, and with intent to defraud and mislead, introducing and delivering for introduction into interstate commerce certain misbranded food in violation of Title 21, United States Code, Section 331 et sep. * * * "

"Counts IV and V. ' * * * said defendants * * * did make and present to said Robinson, being then and there a person in the Naval Service of the United States with authority to approve for payment certain claims upon or against the United States, a false, fictitious and fraudulent claim upon and against the United States, said defendants then and there knowing such claims to be false, fictitious and fraudulent. * * *

"Count V is identical except that the date * * * "

The charges in the Information are equally nonspecific.

Another case cited approvingly by the Supreme Court in *United States v. Russell, supra,* was *United States v. Devine's Milk Laboratories, Inc.*, 179 F. Supp. 799 (D. Mass., 1960). Again the court was compelled to dismiss a one count conspiracy indictment for its failure to indicate the specific false statements or claims alleged. The indictment charged the defendant with having conspired:

" . . . to commit certain offenses against the United States, that is to say, the offenses denounced by the provisions of Title 18, United States Code §§287 and 1001, to knowingly and wilfully make and use, and cause to be made and used, false, fraudulent and fictitious statements in matters within the jurisdiction of the Department of the Army, an agency of the United States, and to knowingly and wilfully made and present false, fictitious and fraudulent claims to the Department of the Army, an agency of the United States, all in violation of Title 18, United States Code, Section 371."

The defendants in *United States v. Mercer,* 133 F. Supp. 288 (N.D. Cal., 1955) were protected from an indictment, which, as in the present case, alleged a scheme to defraud by means of false and fraudulent pretenses, etc. The court held that the indictment failed adequately to apprise the defendant of the factual nature of the scheme to obtain money and of the false and fraudulent pretenses which the government intended to prove.

Counts Two and Three of the indictment, which were dismissed in *United States v. Mercer, supra,* read as follows:

> "Said defendants . . . having devised a scheme for obtaining money by means of false and fraudulent pretenses, representations and promises, transmit sounds by means of interstate wire from Phoenix, Arizona to San Francisco, California, for the purpose of executing such scheme." (Count Three is the same as Count Two except "Texarkana, Texas" replaced Phoenix, Arizona".)

In *United States v. Mercer, supra,* the court referred approvingly to Form 3 (Indictment for Mail Fraud) of the Federal Rules of Criminal Procedure which reads, in part, as follows:

> 1. Prior to the . . . day of . . . . , 19. . . . and continuing to the . . . day of . . . . , 19. . . , the defendants Joe Doe, Richard Roe, John Stiles and Richard Miles devised and intended to devise a scheme and artifice to defraud purchasers of stock of XY Company, a California corporation, and to obtain money and property by means of the following false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be false when made: That the XY Company owned a mine at or near San Bernardino, California; that the mine was in actual operation; that gold ore was being obtained at the mine and sold at a profit; that the current earnings of the company would be sufficient to pay dividends on its stock at the rate of six per cent per annum."

In *United States v. Harris*, 217 F. Supp. 86 (M.D.Ga., 1962), the court dismissed the indictment as insufficient for failure to allege the details of the alleged concealment, covering up, trick, scheme and fraud. The dismissed indictment read as follows:

> " . . . the defendant did . . . (1) conceal and cover up (2) by trick, scheme and device . . . (3) a material fact in the following manner, to wit; . . . the defendant furnished and delivered . . . forty-four (44) rolls of paper, specification MIL-B-13239B, under a contract, . . . that called for furnishing and delivering forty-four (44) rolls of paper, specification MIL-I-3420A, and the defendant well knew that the said paper furnished and delivered did not comply with the required specification and the defendant wilfully and knowingly committed the said fraud; all in violation of 18 U.S.C. 1001.' "

This charge, it might be noted is substantially more specific than Counts One, Two or Three of this Information.

The court in *United States v. Harris, supra*, recommended Form 10 (fraudulent claim against U.S.) of the Federal Rules of Criminal Procedures as providing a clear description and identification of the charge. The form indictment states specifically what the claim was and why it was fraudulent.

In *United States v. Farinas*, 299 F.Supp. 852 (S.D. N.Y., 1969), the court dismissed an indictment charging defendant with violating the Selective Service Act by failing to obey orders of representatives of the armed forces, because the indictment failed to identify the orders allegedly disobeyed. The court held that the statutory language was insufficient to apprise the defendant of the essential elements of the alleged crime.

In *United States v. Borland*, 309 F. Supp. 280 (D. Del. 1970), one count of an indictment was dismissed for failure to detail the tricks, schemes, devices, fraudulent statements and false writings which were used pursuant to the alleged conspiracy.

In *Van Liew v. United States*, 321 F.2d. 664 (5th Cir.,

1963), an indictment for conspiracy to introduce adulterated foods into interstate commerce was dismissed as insufficient for failure to specify the manner in which the statute was violated and the nature of the adulteration.

See also *United States v. Quinn*, 365 F.2d. 256 (7th Cir., 1966); *United States v. Roy Thomas*, 444 F.2d. 919 (D.C. Cir. — 1971); *Davis v. United States*, 357 F.2d. 438 (5th Cir., 1966) *cert denied*, 385 U.S. 927.

United States v. Seeger, 303 F.2d. 478 (2d. Cir., 1962) cited with approval in *Gojack v. United States*, 86 S. Ct. 1689, 1697 (1966) was a prosecution for contempt of Congress in the Southern District. The court reversed a conviction, holding the indictment insufficient for failure to allege the Sub-Committee's authority. The court in holding that the government must plead the essential facts and not mere legal conclusions stated:

> "Anxious as we are to avoid over elaboration and formalism, we cannot condone a 'formalism of generality' ". Id. at 483.

The court also held that a defendant in a criminal case facing possible imprisonment should not be made to guess at the existence of a material element of the crime.

Count One of this Information does not permit the defendant to prepare an adequate defense. Its failure to include a description of the facts constituting the alleged offenses leaves the door open for the government to expand and amplify the Information by introducing evidence relating to any device, scheme, artifice, fraud, misrepresentation, etc. The conspiracy charge is drafted in the language of several broad, generic statutes and as in *United States v. Hess, supra*, 8 S. Ct. at 573, without any of the " . . . particulars as are essential to constitute the scheme or artifice, and to acquaint him (defendant) with what he must meet on the trial." " . . . the absence of all particulars of the alleged scheme renders the count . . . defective . . . "

The government, in its argument, seeks to rectify the deficiencies in the Information by references to certain material contained in the paragraphs which are identified as the Means of

the Conspiracy. However, the government misconceives the purpose, import and propriety of the inclusion of paragraphs setting forth the means by which a conspiracy allegedly was or would be carried out.

A conspiracy may be either a combination of two or more persons to accomplish a criminal or unlawful purpose, or a combination by two or more persons to accomplish a purpose, not in itself criminal, by criminal or unlawful means. When a conspiracy charges an unlawful agreement to promote a criminal purpose, the purpose must be fully and clearly stated in the indictment. The means by which a conspiracy is to be carried out is required only in a situation where the offense consists of an agreement to accomplish a lawful purpose by criminal means. *Pettibone v. United States,* 148 U.S. 197, 13 S. Ct. 542 (1893). See also *United States v. Mercer,* 133 F. Supp. 288 (N.D. Cal., 1955).

Since the Information here charges a conspiracy to accomplish unlawful purposes, allegations detailing the purposes are essential. Allegations concerning the means of carrying out the conspiracy, however, are inappropriate since the Information does not charge a conspiracy to use illegal means to accomplish a lawful purpose. The means allegations have no more effect than the alleged overt acts. They are both inadequate and inappropriate to provide the essential elements of the charges lacking in paragraphs 6 through 10 of Count One.

The purposes of a conspiracy must be set forth clearly and directly in the charging paragraphs and not indirectly or inferentially through a listing of means or overt acts of the conspiracy. The Supreme Court made this very clear in *Pettibone v. United States, supra,* 13 S.Ct. at 545:

> "The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly and not inferentially, or by way of recital."

In the Information, use of the means paragraphs to establish purposes is not only an indirect and inferential method, but even more important, it is hopelessly inadequate.

In the first place, paragraph 11 does not even set forth purposes but merely describes briefly certain alleged factual events.

Secondly, there is no indication in the means paragraphs of where they fit in the conspiracy or to which charges they relate. The defendant is left to guess whether sub-sections (a) through (h) relate to a scheme to defraud, misrepresentations, manipulations, etc. or to which aspects of any of those charges they relate. An indictment must be framed to apprise a defendant "with reasonable certainty, of the nature of the accusation against him . . . " *United States v. Russell, supra* at page 1047.

With respect to paragraphs 11(b) and 11(c) alleging that defendants Duboff and Deutsch entered into certain arrangements and as a result of the arrangements received a certain percentage of profits, referred to as "kickbacks", of KAB, even the government has conceded that this evidence only tends to establish motive.

The confusion resulting from these inadequate charges was evident throughout the trial. There were constant discussions among the court and counsel about the propriety of evidence with the government asserting and the court accepting first one theory and then another for admitting evidence.

Thus, in the early stages of the trial, when objection was taken to certain testimony about representations, the government urged that it was admissible under the language of 11(e) which alleged that defendants had induced the mutual funds to purchase stock. (A143) Later, when objection was made to evidence of purchases by two of the funds with whom defendants had no contact, a theory was adopted that these funds were the victims of false representations which were part of the manipulative scheme. (A1261-A1264) When evidence allegedly in support of the charge of manipulation was objected to because the facts established a fall in price, not a rise in prise as alleged

in 11 (f), the court admitted the evidence on the theory that a manipulation could also involve efforts to prevent a stock price from falling.

As a result, Duboff, who was not directly involved in most of the activities, was in the position of learning for the first time, as the trial progressed, specifically what he was being charged with. Under such circumstances there is no way that Duboff was able to prepare an adequate defense and to address himself to the relevant questions of fact and law. Accordingiy, Counts One, Two and Three should be dismissed.

As has been indicated earlier, Count Four standing by itself was sufficient to charge a crime with reasonable certainty, however, the court in its charge to the jury stated with respect to Count Four, that the jury could convict a defendant of the substantive offense charged in Count Four, if it found that the crime alleged was committed by any one of the defendants, that the commission of that crime was one of the purposes of the conspiracy and that any of the other defendants were members of the conspiracy. Under this charge, a verdict could have been rendered against Duboff merely on the basis of the finding of guilt on the conspiracy count. Obviously, if the conspiracy charge is dismissed, as insufficient, one of the bases for the jury's verdict could have been improper and accordingly, the conviction on Count Four may not be permitted to stand.

POINT TWO

THE COURT ERRED IN REFUSING TO GRANT DEFENDANT'S REQUEST FOR PARTICULARS.

On February 28, 1974, a hearing was held before the Honorable Robert J. Ward, United States District Judge for the purpose of hearing defendants' requests for particulars. A transcript of the proceedings before Judge Ward has not been located. At the hearing, Duboff requested and was denied numerous particulars of the charges. It is Duboff's position that

these particulars were essential to enable him adequately to prepare his defense and to avoid surprise at the trial. The need for these particulars was especially urgent because of the broad nature of the charges in the Indictment and the lack of specificity which has already been discussed and urged as a basis for the dismissal of the indictment in Point One.

Should the court, however, conclude that the indictment was sufficient, then it is most strenously argued that Duboff was entitled to substantial particulars of the charges and that his failure to obtain such particulars is a ground for reversal of the conviction.

The particulars, the request for which were denied, are as follows:

With respect to Count One, paragraph 7, Duboff requested that he be advised of those respects in which it was alleged that the offering circular was false and misleading. While the government indicated that the alleged misstatements contained in paragraph 11(g) constituted a part of the misstatements, it refused to limit itself to the misstatements therein set forth and the court refused to grant any further particulars of the charge.

At the trial Duboff was confronted with testimony seeking to establish that the offering circular falsely stated that various optionees had performed services for Richards and contained misrepresentations with respect to the use to be made of the proceeds of the offering. Neither of these alleged misstatements were referred to in the Indictment.

With respect to paragraph 8 of Count One of the indictment, Duboff was refused any particulars further describing the devices, schemes and artifices to defraud, the identity of any money and property obtained by means of misrepresentations and omissions or the dates and persons from whom such money and property was obtained, any specification of the alleged misrepresentations or omissions, or any description of the transactions, practices and courses of business which operated as a fraud or deceit.

During the course of the trial, evidence was admitted with respect to numerous representations alleged to have been made

at different times to various persons. Thus, Deane testified about representations concerning projected earnings. (A237-A238); Hurley testified about statements concerning the Company's activities, earnings' projections, sale of franchises and the availability of capital (A610, A626-A627) Giasafakis testified about representations in July, 1969, concerning the number of franchises sold which was twice as many as Hurley says were told to him directly in July, 1969 (A845) and Papworth testified about statements made to him which were included in his report including the statement about the acquisition of F & T Meat Company. (A776-A777) In addition, there was testimony about the issuance of seven press releases containing statements about the Company (A1178). There was testimony about requests for an annual report and the delay in the mailing of the annual report allegedly for the purpose of establishing omissions to state material facts. Joseph Kally testified about certain problems experienced by Richards again allegedly in support of omissions to state material facts. In addition to the foregoing, there were bits of testimony throughout the trial concerning conversations with Deutsch or Cohen which may or may not have related to alleged misrepresentations.

Since the indictment did not specify any particular misrepresentation and since no particulars were provided specifying any misrepresentation, Duboff was confronted with a situation in which he was forced to speculate throughout the trial whether any statement made during the course of any conversation as to which testimony was adduced was a purported misrepresentation. Since he was never advised of what misrepresentations were alleged to have been made or when or to whom they were made, any one or all of the representations as to which evidence was offered could have been the basis for his conviction. The problem was compounded by the broad nature of the court's charge to the jury; which merely instructed them generally as to what constituted a misrepresentation and then after giving them one or two examples, told them to rely on their recollections of any other misrepresentations charged. (A1561-A1562)

Thus, not only was Duboff required to face unspecified charges without particulars, depriving him of any opportunity for advance preparation for his defense, it is not even possible to determine at this stage which, if any, misrepresentation was found by the jury.

The same problem exists with respect to the charge in paragraph 8 that defendants conspired to use devices, schemes and artifices to defraud and that they engaged in transactions and practices which operated as a fraud. Since the indictment did not provide any information with respect to this allegation and since no particulars were provided, Duboff was again forced to speculate throughout this lengthy trial whether any particular act or declaration adduced in evidence was purportedly part of a scheme or a fraudulent practice and if so, exactly what the fraudulent practice or scheme was.

To make matters worse, at various times during the trial the court admitted evidence on varying theories, sometimes holding that testimony was evidence of a misrepresentation, sometimes that it was evidence of a fraudulent scheme and sometimes, with respect to misrepresentations, that they were a part of a manipulation. This engendered even further confusion.

The prejudice resulting from Duboff's inability to know in advance what specific misrepresentations were charged was substantially aggravated by the fact that most of the representations involved in the testimony related to the business affairs of Richards with which Duboff was not directly involved. Moreover, Richards was no longer in business at the time of the trial and its records were located in Minneapolis. As a result, it was impossible during the course of the trial for Duboff to obtain necessary information to refute the charges of misrepresentations.

Duboff was confronted with precisely the same problems with respect to paragraph 9 of Count One with respect to which particulars were refused describing the scheme and artifice to defraud and the false pretenses and misrepresentations.

Duboff further requested particulars with respect to the manipulative devices allegedly used by the conspirators as

charged in paragraph 10 of Count One. These particulars were also refused.

Time and time again during the course of the trial evidence was admitted by the court over objection on the theory that it was or could be part of a manipulative scheme. In many situations it was apparent during argument on defense objections that the government and the court were attempting to conform the evidence to the charges, developing theories of admissibility as they went along.

As a result of his inability to obtain particulars of the charges and in the absence of any details in the Information, Duboff was hampered throughout the trial in his efforts to meet the government's proof, to his very substantial prejudice. All of the evidence with respect to misrepresentations, fraud and manipulation came as a complete surprise during the trial and left Duboff no opportunity for investigation of facts and preparation for cross-examination. As was previously stated, the misrepresentations in all cases dealt with the business affairs of Richards. Since Duboff did not learn until the actual trial what misrepresentations were supposed to have been made, he was in no position to establish the truth of any of the representations, since he had no control over or familiarity with the records of Richards. In the same fashion, he was unable to accumulate evidence to refute the charges of manipulation since only during the course of the trial did he learn the manner in which the manipulation allegedly took place.

Moreover, by virtue of the wording of the Information, Duboff was completely misled. The only reference in the Information to any activity which could be part of a manipulation was the statement in paragraph 11(e) in the Information to the effect that Deutsch and Duboff had induced the mutual funds to purchase stock for the purpose of restricting the supply and causing the price to rise. Duboff was prepared to meet this charge and in fact, on the basis of the evidence, that charge was established to be absolutely baseless. As may be seen from the testimony of Hurley, no one induced the mutual funds to buy Richards stock. In fact, there was not one word of testimony to

indicate that the mutual funds were induced to buy stock. At the trial, however, Duboff was completely surprised by the government's contention, which the court accepted, that the inducement had been accomplished by means of misrepresentations about which Duboff heard for the first time at the trial.

However, the court went even further and despite the fact that the only specific allegation of the complaint charged defendants with causing the price of the stock to rise, the court admitted evidence at various times as tending to support a charge of manipulation because certain acts might have resulted in maintaining stock at a particular level or preventing stock from dropping.

In effect, the absence of specific charges in the indictment and the absence of a delimiting bill of particulars enabled the government with the approval of the court to continually modify or revise the theory of its charges to fit the evidence, constantly subjecting defendants to surprise.

The court went so far as to permit questioning on cross-examination of Mayer, an expert witness for the defense, on the existence of a relationship of trust between a broker and a mutual fund on the theory that such evidence could be considered by the jury as indicating that defendants may have misled the funds by violating their obligation to them. (A1411-A1412) Nowhere in the government's direct case was any such misrepresentation even remotely referred to.

With respect to paragraph 11 of Count One, the court refused to require the government to identify the accounts allegedly controlled by defendants as described in subparagraph (a) or the dates or method of payment of the alleged kickbacks described in subparagraph (c).

This brief does not propose to discuss in any detail the applicable law relating to bills of particulars. The law is clear that a defendant is entitled to those particulars necessary to enable him adequately to prepare his defense in order to avoid surprise. The law is also clear that particulars are not to be used as a method by which the government's evidence will be revealed to a defendant. There is some contradiction between these two

requirements since obviously, every particular will have some tendency to reveal the government's evidence. As a result, the decision as to whether or not to grant particulars rests within the discretion of the court. An abuse of that discretion, however, can be reviewed on appeal. *Wong Tai v. United States*, 273 U.S. 77, 47 S.Ct. 300 (1927).

In this case, it is submitted, the court's failure to grant the requested particulars was an abuse of that discretion. The particulars requested in this case would not have revealed the government's evidence except by implication and only in a very insignificant fashion. The nature of the particulars requested make it amply clear that it was not Duboff's purpose to discover the government's evidence. For example, no evidence of the government would have been revealed had Duboff been advised of the alleged misrepresentations which he was charged with making.

On the other hand, the need for particulars was greater in this case than in the average case because of the incredible lack of specificity in the indictment. It is the height of inequity to require a defendant to defend against a charge that he misrepresented a fact four years earlier without telling him what the fact was that he allegedly misrepresented and when, where and to whom he is charged with having made that representation. It is a perversion of our system of justice to force a defendant to stand trial on charges that he engaged in a scheme to defraud without in any way describing that scheme.

All of the particulars requested with respect to Count One were requested to the extent applicable with respect to Counts Two, Three and Four and all of them were denied.

In *United States v. Caine*, 270 F. Supp. 801 (S.D.N.Y.—1967), Judge Mansfield, while holding that an indictment for mail fraud sufficiently described the fraudulent scheme, also found that to the extent that the indictment failed to spell out details of the scheme, a bill of particulars would be granted. Specifically pertinent to this case, Judge Mansfield required a statement setting forth each false pretense, representation and promise.

In *United States v. Crisona*, 271 F. Supp. 150 (S.D.N.Y.—1967), Judge Mansfield, holding that a defendant should not be deprived of necessary information solely because that information might be used by the government as evidence, required the government to identify the persons to whom false representations allegedly were made. In that case, the indictment had already detailed the alleged misrepresentations.

In *United States v. Pilnick*, 267 F.Supp. 791 (S.D.N.Y.—1967), Judge Weinfeld required the government in a bill of particulars to set forth any false representations which it intended to prove which were not specifically referred to in the indictment.

For all of the foregoing reasons, the failure to grant to Duboff the requested particulars of the charges against him, deprived him of a fair trial and requires a reversal of the conviction.

POINT THREE

THERE WAS A FATAL VARIANCE BETWEEN THE CHARGES ALLEGEDLY PROVED AND SUBMITTED TO THE JURY AND THE CHARGES CONTAINED IN THE INFORMATION.

Although the prosecution in this case was based upon an Information filed by the United States Attorney after a waiver of indictment was executed by all defendants, the original Indictment filed is to be treated for all purposes as the basis for the charges. The original indictment was dismissed, and the Information substituted therefor only at the court's request, to reduce the number of counts. It was the understanding of the court and all parties, however, that for all other purposes, the trial would proceed as if based upon the Indictment.

The Fifth and Sixth Amendments to the Constitution require that an accused be informed of the nature of the accusation and be held to answer for a crime only upon a presentment or indictment of a grand jury. The applicable principle has been set forth in *United States v. Russell, supra*, 82 S.Ct. at page 1051 as follows:

> "The party (defendant) can only be tried upon the indictment as found by such grand jury, and especially upon all its language found in the charging part of that instrument."
>
> "Any other doctrine would place the rights of the citizen which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney . . . "

To permit evidence of charges not contained in an indictment would, in effect, permit the United States Attorney to amend the indictment voted by the grand jury. This, he cannot do. The Supreme Court has consistently held that " . . . an indictment may not be amended except by resubmission to a grand jury, unless the change is merely a matter of form", *Russell v. United States, supra,* 82 S.Ct. at 1050. See also *Ex Parte Baine, supra; Stirone v. United States, supra.*

The reasons for the prohibition were clearly and succinctly stated by Judge Feinberg in *United States v. Caine,* 441 F.2d. 454, 456 (2d. Cir., 1971):

> " . . . to protect the defendant from being surprised at trial by evidence on charges for which he had justifiably not prepared;" and
>
> " . . . to assure that a defendant is not convicted of charges either rejected or not considered by the Grand Jury."

A case peculiarly pertinent to this case is *United States v. Pope,* 189 F. Supp. 12, 26 (S.D.N.Y., 1960). In that case, Judge Weinfeld, dealing with an indictment under the Securities Act of 1934 which charged the defendants with making false and misleading statements, held that the indictment could not be enlarged by proof of false and misleading statements which were not referred to in the indictment returned by the grand jury. Judge Weinfeld stated:

> "A specific charge made by the Grand Jury may itself fail for lack of proof and yet, if the prosecution may augment the charges . . . , the defendants may finally be prosecuted and convicted on charges of falsity

in the statements not considered by the Grand Jury, or, if considered, may have been rejected by it."

"It is no answer to the defendants' claim of prejudice . . . that they could restrict the charges by a motion for a bill of particulars. A bill of particulars would permit the prosecution to go beyond the Grand Jury accusation, as set forth in the indictment, by adding thereto specifications of false and misleading statements . . . This would enable the prosecution to 'guess at what was in the Grand Jury's mind' . . . " (United States v. Lattimore, 1954, 94 U.S. App. D.C. 268, 215 F.2d. 847, 850).

It is the position of Duboff that the evidence admitted at the trial of this action and which was submitted to the jury as a basis on which a conviction could be had, was not included in any charging paragraph of this Information and that hence the conviction cannot stand. Evidence was submitted to the jury of misrepresentations, fraudulent acts and manipulative practices which were not charged in the indictment. In fact, the indictment did not even refer to the category of misrepresentations concerning the business or financial condition of Richards.

As was stated by the court in *Gaither v. United States*, 413 F.2d. 1061 (D.C. Cir., 1969) at 1971:

"A variance occurs when the charging terms of the indictment are left unaltered, but the evidence at trial proves facts, materially different from those alleged in the indictment."

A careful reading of the indictment in this case reveals only one paragraph, paragraph 11(g) or Count One, which is incorporated into Counts Two and Three and repeated in Count Four, which refers to a misrepresentation of fact. That paragraph deals solely and exclusively with alleged misstatements in an offering circular relating to the manner of distribution of the stock and the relationship to the company or to the underwriting of certain named persons. Despite the limited number of alleged misrepresentations and the limited area with which they dealt, the court, over constant vigorous

objections, permitted a vast array of evidence of misrepresentations to be adduced and considered by the jury. The most damaging testimony relating to these misrepresentations dealt with statements allegedly made by Deutsch and Cohen about the number of franchises of fast-food restaurants which had been sold at various points in time by Richards. There was testimony by Hugh Deane that in February, 1970, he was told by Deutsch that 200 franchises had been sold. (A258) There was testimony by John R. Hurley about conversations with Deutsch and Cohen in 1969 about the number of franchises. (A610, A626); there was testimony by James Giasafakis about a conversation with Deutsch in the summer of 1969 at which he was told that 200 franchises had been sold; (A845) and finally, there was evidence in the form of a press release dated April 6, 1970, issued by Richards, stating that 210 franchises had been sold. (G.E. 25 G). (A1881)

Not one word appears in the indictment charging Duboff or any other defendant with having made any representation about the number of franchises sold by Richards or for that matter, about any aspect of the business of Richards. The prejudice resulting to Duboff from the admission of this evidence, standing alone, is sufficient to warrant a reversal of his conviction. Not only was he unaware of the necessity of meeting and defending against this charge, but the testimony did not establish that Duboff at any time had made any representation to anyone about the number of franchises sold or any other aspect of Richard's business for that matter. It needs no great imagination to conclude that a significant role in the jury's verdict was played by the misrepresentation contained in the press release as to the number of franchises sold.

This particular misrepresentation received great emphasis during the trial. Several witnesses testified about representations concerning the number of franchises sold. A press release (G. E. 25G) (A1881) was introduced referring to the number of franchises sold. Two witnesses were called for the purpose of establishing that the statement was false. A major point was made of this misrepresentation in the government's

summation. Finally, the court singled out this misrepresentation to use as an example in its charge to the jury. (A1561-A1562)

The importance attached by the jury to this particular charge is evident from the exhibits which they requested. Fewer than 10 exhibits were requested. One of them was the draft of the April 6, 1970 press release which referred to the sale of 210 franchises and to which was attached the telephone message from Duboff. The other was the annual report for the year ended June 30, 1970 which was introduced for the sole purpose of establishing the number of franchises reported sold in that report.

It is submitted that the admission of this evidence permitted such a substantial, prejudicial variance from the charges contained in the Indictment, that a reversal is required.

Lest there by any doubt that this misrepresentation was not a charge intended by the grand jury, an analysis of the testimony of the witnesses who appeared before the grand Jury which will be covered in Point Four, reveals that there was not one word of testimony before the grand jury on this subject.

Precisely the same variance occurred as a result of testimony concerning numerous other misrepresentations and omissions with which the defendants were charged. Thus, evidence was adduced by the government in support of a charge that misrepresentations were made concerning the availability of a line of credit of $20 to $25,000,000; concerning the projected earnings of Richards in future years; concerning an acquisition of F & T Meat Packing Company; concerning the success of the current operations of Richards; and concerning the alleged deliberate withholding by Richards of its annual report for the year ended June 30, 1969 in order to conceal from the public its true financial condition. Not one of the charges is referred to in the indictment nor was there any evidence with respect to these charges before the grand jury.

The government and the court apparently recognizing the inequity of the situation, attempted, as the trial progressed, to devise alternate theories to support the introduction of evidence of these misrepresentations. These theories, however, merely

serve to distort the outlines of the limited charges of the indictment into an unrecognizable shape. For example, the government contended with the court's blessing that the alleged misrepresentations to John Hurley were admissible to establish the charge in the indictment that the defendants had "induced" the mutual funds to purchase the stock of Richards. This theory served, not only to justify in the eyes of the government testimony of misrepresentations, but also it served to compensate for the yawning gap created in the government's case when it developed through the testimony of Hurley and Deane that the funds had not been induced to buy by Deutsch but rather had sought out Deutsch for advice. In fact, there was not one word of testimony that Deutsch had ever urged the funds at any time to purchase Richards' stock. Rather, it developed that the funds were interested in companies with which Deutsch was connected and Deutsch did no more than to answer questions about those companies.

However, ingenious as the government's theory may be, it does not serve to justify the admissibility of evidence of misrepresentations nowhere charged in the indictment. It defies logic to contend that charges of misrepresentation which would be inadmissible because not spelled out in the indictment, become admissible because of the use of the word "induce".

The error committed by the court in admitting all of the testimony on misrepresentations was compounded by the incredibly broad, unlimited nature of the court's charge to the jury on the question of misrepresentation. The court instructed the jury that false misrepresentations means *any* misrepresentations regarding present or past facts, or *any* opinion expressed or *any* predictions as to the future which are not made in good faith or which are made in reckless disregard for the truth. The court then went on to charge that a scheme to defraud includes *any* plan by which one seeks to obtain money or property from another by means of misrepresentations as to a material fact. It is clear from the nature of this charge that virtually any evidence at this trial on the question of misrepresentations could have the basis for the jury's finding of guilt. (A1561-A1562, A1583-A1584)

The same objections exist with respect to all of the evidence admitted as to an alleged manipulation and as to the alleged fraudulent scheme. By permitting the government to introduce substantial evidence in support of charges nowhere described in the Indictment, the court permitted the government to devise its own charges as it proceeded and to prove charges never intended by the Grand jury.

Generally, the variance between the proof and the charges must be found by the court to be prejudicial in order to warrant a dismissal of an indictment. *United States v. D'Anna*, 450 F.2d. 1201 (2d Cir., 1971); *Berger v. United States*, 55 S.Ct. 629 (1935). However, where the variation in proof is so great as to amount to a constructive amendment of the indictment, it is prejudicial per se. *Stirone v. United States*, 80 S.Ct. 270 (1960); *Gathier v. United States*, *supra* and *United States v. DeCavalcante*, 440 F.2d. 1264 (3rd. Cir., 1971).

It is submitted that the admission of proof of numerous misrepresentations, manipulative conduct and fraudulent acts nowhere charged in the Indictment constitutes such a substantial variation in this case as to virtually mandate a reversal of the conviction.

In *Stirone v. United States*, *supra*, the Supreme Court reversed a conviction on charges of obstructing interstate commerce where the evidence established that the defendants obstructed interstate commerce in concrete and steel, whereas the indictment charged them with obstructing interstate commerce in ready mixed concrete.

How much more inequitable is it for a defendant to be charged in an indictment with making misrepresentations in an offering circular and then to be convicted on charges that both before and after the date of the offering circular he made representations about the business of the company in no way connected with that Offering Circular.

In September, 1974, the Court of Appeals for the Fifth Circuit in an *en banc* decision reversed a conviction because of a variance between the proof and the charges in a fact situation almost *de minimis* when contrasted with the fact situation in the

instant case. *United States v. Lambert*, 5th Cir. — 9/20/74.

In that case defendant was charged with having made a false statement to the FBI when he stated that he had been severely beaten and subjected to illegal and unnecessary punishment by two members of the Tampa Police Department. The evidence, however, established that the defendant had not made a statement in such language but rather than he had recited various instances of physical contact with the police officer and alleged that he had been arrested without reason. The language of the court in reversing is significant.

> "In this situation a defendant is left to guess what part or parts of the statement placed in evidence the government will rely upon, or whether it will rely on overall tenor. The prosecution is free at trial, in offering evidence and arguing to the jury, to pick and choose previously unspecified bits and pieces of the statement that it considers arguably relevant to its conclusory restatement. The safe defense for such a defendant—with respect to every arguably material utterance in the actual statement that is also arguably relevant to the conclusory language—is to prove that he did not utter it or that it was true. Even then he faces the threat that without regard to specifics the gist of the entire statement may be viewed as conforming to the indictment's charge. An indictment which leaves in this dilemma a defendant who has given a lengthy and detailed statement is outside the allowable range of variance."

How much more grievous is the injury suffered by Duboff when confronted with this Information and the evidence adduced in support of it. He is left to guess what statements or what parts of what statements the government is relying on or whether it is relying on the overall tenor of statements and omissions while the prosecution is free in offering evidence and arguing to the jury to pick and choose previously unspecified statements and portions of statements and omissions that it considers relevant to the conclusory statements in the Information that defendants misrepresented, made omissions of

facts, engaged in fraudulent schemes and engaged in manipulative activities.

POINT FOUR

THE CHARGES ALLEGED TO HAVE BEEN PROVED AND WHICH WERE SUBMITTED TO THE JURY WERE NOT SUPPORTED BY EVIDENCE ADDUCED BEFORE THE GRAND JURY.

The Constitutional guaranty of the Fifth Amendment that no person shall be held to answer for a capital or otherwise infamous crime, except upon indictment by a Grand Jury, has been held implicitly to require that the charge of a Grand Jury be based upon facts either found by or presented to the Grand Jury which reported the true bill of indictment. *Russell v. United States, supra.*

The court must be assured that the essential elements of the crime were presented to and deliberated upon by the Grand Jury before it returned the indictment and more importantly, that the "defendants are not tried upon a theory or evidence which was not fairly embraced in the facts upon which the Grand Jury based its charges". *United States v. Silverman,* 430 F. 2d. 106 (1970 at page 111).

While it is conceded that all of the evidence tending to support a charge need not have been presented to the Grand Jury and that the requirement is satisfied by some evidence sufficient to establish a prima facia case, it is clear that if no evidence to support the charges at the trial was adduced before the Grand Jury, the indictment should be dismissed. *United States v. Costello,* 221 F.2d. 668 (2d. Cir.) affirmed, 76 S. Ct. 406 (1956).

It is the position of Duboff that no evidence of any kind was submitted to the Grand Jury in support of charges that defendants misrepresented to purchasers facts with respect to the business of Richards, that defendants engaged in any manipulative activities in conspiracy with Shwidock or Mazzeo, that defendants induced the mutual funds to purchase stock, that purchases by the mutual funds Deutsch controlled New

Dimensions. Since these basic charges are not supported by any evidence before the Grand Jury, the Information should be dismissed.

The court, at the request of defendants, examined the Grand Jury minutes and concluded that the evidence submitted to the Grand Jury was sufficient to establish a prima facia case. In connection with its review of the Grand Jury testimony, the court advised counsel of the identity of the witnesses who appeared before the Grand Jury. From the identity of the witnesses who testified before the Grand Jury and the 3500 material available for those Grand Jury witnesses who testified at the trial, it is possible to ascertain with some degree of certainty, the nature of the testimony available to the Grand Jury.

The following witnesses testified before the Grand Jury and at the trial:

Hugh W. Deane
Bernard Schwidock
John R. Hurley
Fred Paul Mazzeo

An examination of the Grand Jury testimony of these witnesses reveals, however, that before the Grand Jury they testified to little or nothing relating to the charges which the government ultimately attempted to prove.

Hugh Deane's testimony (G.E. 3501) (A2037-A2039) reveals only the following Grand Jury testimony pertinent to the charges. At page GH-2 (A2037) he testified that Hurley asked him in early 1969 about Deutsch and some of his companies. At page GH-3 (A2038) he testified that Deutsch seemed to be doing a good job with certain companies. At page GH-3 and GH-4 (A2038-A2039) he testified to a conversation with Hurley and Robert Anton, another portfolio manager, in which they discussed some of Deutsch's stocks, but he was not certain that they mentioned Richards.

All of the rest of Deane's testimony was irrelevant to the issues at the trial. Nowhere before the Grand Jury did Deane testify about representations made to him by Deutsch about any aspect of the business of Richards. Certainly, there was no

testimony by Deane that Deutsch or anyone else told him about earnings' projections or the number of franchises which had been sold. At the trial, however, a major portion of Deane's testimony related to those alleged representations.

Shwidock's testimony is embodied in government's Exhibits 3516, (A2040-A2041), 3517, (A2042-A2046), 3518, (A2047-A2048), 3519, (A2049-A2061), and 3521 (A2062-A2074). Shwidock testified before the Grand Jury about the alleged kick-back arrangements with Deutsch and Duboff. In addition, at page EJC-3 (A2047) of G.E. 3518, he stated that he purchased and sold Richards as Duboff directed him to and at page EJC-5 (A2048) he stated that the prices quoted by KAB for Richards was done at Duboff's direction. There was no testimony whatsoever describing the nature of the trading.

Hurley, in his Grand Jury testimony, (Government's Exhibit 3545), (A2075-A2109), testified only that he had spoken to Deutsch about various stocks and that Deutsch, with respect to all of the stocks, had indicated that earnings' projections would be small to begin with and were expected to jump thereafter. He did not testify about any representations by Deutsch or anyone else or about any inducement by anyone to purchase the stock of Richards.

Fred Mazzeo (Government's Exhibit 3569) (A2110-A2126), testified only that there were circumstances in which Deutsch or Duboff would tell him that KAB had stock to sell and he would approve making a purchase at KAB. He did not testify, as he did at the trial, that he was directed in his trading of the stock in any respect by Deutsch and Duboff.

The other witnesses who testified before the Grand Jury were:

John M. Butler
Lambert Hirsheimer
Jules Moskowitz
Charles Peters
Raymond Weiss

In addition, prior testimony of the following witnesses was read to the Grand Jury:

George Van Aken
Leonard Thun

Although the Grand Jury testimony of these witnesses is not available to the defense, it may easily be presumed that such testimony could not add anything to the testimony already discussed.

John M. Butler's identity is unknown, but his name never came up during the course of the trial and it is safe to assume, since the Grand Jury was investigating activities in at least four different stocks, that Mr. Butler's testimony had nothing to do with Richards.

Lambert Hirscheimer was identified during the trial as the trader for the mutual funds and it appeared during the course of the trial that he never had any relationship with any of the defendants and could only have testified before the Grand Jury to identify the trading records of the fund. (A686)

Jules Moskowitz is an SEC attorney and clearly could not have testified about any of the facts relating to misrepresentation or manipulation.

The identity of Charles Peter is unknown but again, his name did not arise during the course of the trial and it can be assumed that his testimony did not relate to the charges in this case.

Raymond Weiss was identified during the trial as a trader at the brokerage firm of Allessandrini & Co. (A517) In addition, he and Allessandrini & Co. were named co-conspirators. His testimony, at best, could only relate to trading activity by Allessandrini & Co. in Richards stock.

George Van Aken and Leonard Thun are named as a co-conspirator and a defendant respectively in another indictment involving the stock of Acrite Corp. Their names were never mentioned during the trial and the presumption is that their testimony related only to Acrite stock and not to any of the charges in this Information.

It thus appears very clearly that there was no evidence before the Grand Jury to support the charges allegedly proven by the government at the trial in the following categories:

(1) Misrepresentations and omissions with respect to the business of Richards.

(2) Manipulation of the price of Richards stock through purchases by the mutual funds.

(3) Manipulations of the price of Richards stock through the direction of trading by KAB.

(4) Manipulation of the price of Richards stock through direction of trading by New Dimensions.

With respect to misrepresentations and omissions concerning the business of Richards, no evidence of any kind was submitted to the Grand Jury establishing that any representations were made or that any facts were omitted from any representations.

With respect to purchases by the mutual funds, the only witnesses who testified were Hurley, who testified only that he had spoken with Deutsch about various stocks and Hirsheimer, the trader who at most could have testified that certain stocks were purchased by the mutual funds. There was not one word of testimony relating to the manner in which those purchases were made or how the mutual funds came to make such purchases. Clearly, there was no evidence that the mutual funds were induced by anyone to make such purchases as charged in the indictment.

With respect to trading activity of KAB, the only testimony was Shwidock's, who testified only that he purchased and sold Richards stock as directed by Duboff and that the prices which he quoted were quoted at Duboff's direction. This testimony is hardly the basis to support a charge that Shwidock, Duboff and the others were engaged in a conspiracy to manipulate prices.

Insofar as New Dimensions is concerned, there was no testimony at all before the Grand Jury.

In substance, the court below by finding that the evidence before the Grand Jury established a prima facia case was, in effect, stating that any minor evidence relating to one or two aspects of the crime charged was enough to support all of the broad charges of this Indictment. It is submitted that such an interpretation misapprehends the function of a Grand Jury and

of an indictment. An indictment is supposed to contain only those charges with respect to which evidence has been adduced before a Grand Jury, since the charge being made is the charge of the Grand Jury. To permit the United States Attorney to draft an indictment allegeding a broad and varied conspiracy on the basis of only limited testimony as to certain aspects of that conspiracy perverts this function. What the court has permitted here would be equivalent to allowing a charge of five larcenies on the basis of evidence before a Grand Jury that one larceny may have been committed.

The gaps in the testimony before the Grand Jury were not insignificant gaps. The charges not established before the Grand Jury constituted the bulk of the government's case. This is particularly true with respect to the misrepresentations concerning the business of Richards and the manipulation allegedly occurring through the inductment of the mutual funds to purchase stock. The most substantial items of testimony during the trial related to these two areas and yet, not one word of testimony was adduced before the Grand Jury to support such charges.

As a result, defendants were tried not on charges determined by a Grand Jury but on charges conceived by the United States Attorney.

Since most of the charges on which defendants were tried and convicted were not based upon evidence submitted to the Grand Jury, the indictment was defective and should be dismissed and the conviction should be reversed.

POINT FIVE

THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH DUBOFF'S GUILT ON ANY OF THE CHARGES BEYOND A REASONABLE DOUBT.

In discussing the sufficiency of the evidence, primary consideration will be given to Count 1, the conspiracy count, since Counts 2, 3 and 4 charge substantive crimes allegedly encompassed by the conspiracy, the commission of which was the basis for the alleged conspiracy charge.

Moreover, in view of the court's charge which enabled the jury to find Duboff guilty of the substantive counts if it found him guilty of the conspiracy charge, a dismissal of the conspiracy count would mandate a dismissal of the substantive counts.

Although the government and the court proceeded on the basis that the indictment charged and the evidence tended to establish a single conspiracy, the disparate nature of the various aspects of the alleged conspiracy requires separate treatment of each aspect.

Initially, we intend to discuss the evidence relating to the charge that defendants conspired to use the mails to transmit a false Offering Circular in connection with a public offering of 10,000 shares of Richards.

Although Duboff denies that the Offering Circular was false in any material respect, before discussing the specific charges of falsity, attention will be directed initially to the issues of responsibility and intent. In other words, assuming that statements in or omissions from the Offering Circular made it misleading, did the evidence establish beyond a reasonable doubt that Duboff alone or in concert with others was wilfully and knowingly responsible for the filing of the Offering Circular with erroneous information.

It was undisputed at the trial that the responsibility for the actual preparation and filing of the Offering Circular, was delegated to Alvin Malmon, the attorney for the Company and a SEC specialist. It is likewise undisputed that none of the information included in the Offering Circular derives from Duboff or Deutsch and that they were never consulted about the nature of the information to be included or excluded from it. All of the material contained in the Offering Circular was obtained, according to Malmon, either from his own files for a previous public offering or from Cohen. (A121c-A121d) Malmon, himself, made the determination as to what information was material. (A121c)

Since they were not responsible actually or legally for its preparation and since they played no role in its preparation, Deutsch and Duboff can be criminally liable for misinformation

in the Offering Circular only if it was established beyond a reasonable doubt either that they knowingly and wilfully concealed the true facts from those responsible for its preparation or that they wilfully caused the Offering Circulars to be mailed knowing that they contained materially misleading facts. The evidence establishes neither.

Not one witness testified to any attempt by Deutsch or Duboff or anyone else for that matter, to conceal any of the facts with regard to the manner in which the stock was sold, or the role played by them or KAB in the underwriting. On the contrary, Deutsch arranged to obtain, prior to the effective date, at the request of KAB, written confirmation from Richards of KAB's function. (A368-A369) (A2127) (Cohen Exh. F). Moreover, all of the records relating to the sales of the offering to the mutual fund, William Harris, Harry Morganstin and KAB were always openly kept and available. Had Malmon properly performed his job as counsel for the company, he could and should have obtained by a telephone call, all of the necessary information. There was a letter in Malmon's file dated March 6, 1969, from Cohen, advising him of KAB's role. (A179) In addition, Malmon on March 17 and 19, 1969, in writing, advised the transfer agent to arrange for the transfer of the 10,000 shares to KAB, which he knew to be a brokerage firm. (G.E. 9, 9B, 9C, A176) (A1774, A1777, A1779). He says that despite this knowledge, he did nothing to file an amended Offering Circular because he forgot that the Offering Circular had provided that if an underwriter was used, an amendment identifying him would be filed. (A177) Had such an amendment been filed, two of the alleged misrepresentations would not have occurred.

As this court is well aware, and as both Malmon and Ruth Appleton, the government's expert witness, testified, preparation of an Offering Circular is generally entrusted to an attorney specializing in SEC work because of the complex nature of the Securities Laws. Laymen and even most lawyers are unaware of the nature of the information which must be included. It is the responsibility of the lawyer to ask for the necessary information and to instruct the client with regard to

the facts which must be provided to the attorney for inclusion in the Offering Circular. Malmon did none of those things. This was true despite the fact that he assumed the responsibility for determining what was material. (A121e)

Although Cohen had indicated to him that Richards might use a broker in the sale of the stock, Malmon never instructed Cohen to inform him of that fact if it occurred (A211), and never even asked Cohen how the issue was sold. (A172, A211) He never asked Cohen what KAB had done or the circumstances of the transfer to KAB. (A176, A212) This was true even though his knowledge of the transfer to KAB should have put him on notice that KAB might be an underwriter. (A177) He did not tell Cohen to keep him advised of the method of sale and indeed after the effective date of the offering, he never even had any conversation with Cohen about the sale. (A211) Malmon knew that Deutsch was going to help sell the stock but never asked any further questions or advised Cohen of any restrictions or requirements which might be effective if Deutsch participated in the sale. (A210)

Malmon never asked Cohen about the nature of the services to be performed by the recipients of stock options or the consideration for the transfer of stock (A213, A215) and he never advised Cohen that if the consideration for the options or the stock was services to be rendered in connection with the underwriting, it might have to be revealed in the Offering Circular.

Under all of the foregoing circumstances, it is impossible to conceive of any basis for a finding of criminal liability on the part of Deutsch, Duboff or even Cohen. They all relied on company counsel to report what was required and to ask for any information he needed in that connection. They concealed nothing from him. If the attorney responsible for preparation of the return neglected his obligation properly to advise his client and to ascertain all of the pertinent facts how can it be said that Duboff was criminally responsible for filing a false Offering Circular. There is not even any evidence that Duboff ever saw the Offering Circular, let alone reviewed it. At best, even if it be assumed, although there was no such evidence, that Duboff had

sufficient knowledge of the requirements of an Offering Circular to have asked some questions of Cohen or his attorney, it can only be said that he was negligent and possibly liable civilly. But where is there any evidence of wilfulness or a bad intent?

The proof as to this charge fails, however, for other reasons. The evidence is insufficient to establish that the alleged misrepresentations were in fact misrepresentations or that they were material.

The first alleged misrepresentation referred to in paragraph 11(g) of Count 1, is that the offering was not being made to the public, but rather to accounts controlled by Deutsch and Duboff, or in which they had a beneficial interest. This allegation, it is submitted, is based upon a complete misconception of the meaning and purpose of the Securities Act of 1933, as amended. It presupposes that by the use of the term "public offering", the statute was somehow imposing a requirement that any registered offering must be made available to the general public. Such, however, is not and never has been the purpose of the law. The only function of the law is to provide adequate disclosure to a purchaser of stock when a public, as opposed to a private, sale of securities occurs. Prior to the adoption in 1974 of Rule 146 by the Securities and Exchange Commission, a public sale as distinguished from a private offering was defined by the Supreme Court as a sale to one or more persons not related to each other or to the issuer who did not have access to detailed information about the company. *S.E.C. v. Ralston Purina Co.*, 346 U.S. 119. If an offering is public as thus defined, either a registration statement or where less than $300,000 is involved, a notification must be filed with the SEC, and the prospective purchaser must be provided with a prospectus or an offering circular. While we have become accustomed to large scale offerings to the public, a small offering to as few as two persons may also be public and require registration. Once a registration statement has been filed, there is absolutely no requirement under the law that the securities covered be offered to any particular number of people or to any particular group of people. There is no reason why 5,000 of the

10,000 shares here involved could not be sold to a single mutual fund as was done here. Nor is it material whether or not that fund was controlled by Deutsch, although there is not one word of testimony to indicate that it was. The same is true of the 3,000 shares purchased by William Harris and Harry Morganstin, the father-in-law and brother-in-law respectively of Duboff and Deutsch. Although it is submitted, the evidence failed to establish that Duboff and Deutsch had a beneficial interest in these accounts, it is immaterial whether they did or not. Deutsch and Duboff as well as their relatives had an absolute right to buy the stock. They could properly have bought it all if they had so desired.

The final 2,000 shares were purchased by KAB for its trading account. Again, there was no impropriety since, even an underwriter, has the right, and in the case of a firm underwriting, the obligation, to purchase stock not sold to others.

Thus there is no basis in law or fact to any claim of falsity in respect to the alleged public nature of the offering. The Offering Circular does not state that the offering is being made to the general public and the offering is not required to be made to the general public.

The second respect in which the Offering Circular is alleged to be false and misleading is its alleged failure to disclose that Deutsch, Duboff, KAB and Bernard Shwidock, the President of KAB were underwriters and were receiving compensation for being underwriters. It is submitted, on the basis of the conflicting testimony by experts at the trial, that it cannot be said that the evidence establishes beyond a reasonable doubt that the named persons were underwriters.

The definition of an underwriter is contained in Section 2(11) of the Securities Act of 1933 and, if read literally, would include anyone who plays any role in the sale of securities, even an attorney, accountant, secretary or messenger delivering certificates. Obviously, a rule of reason must be applied, as even the government's expert witness, Ruth Appleton ultimately conceded, albeit somewhat reluctantly. Quite naturally, considering her position and years of service with the SEC, she

concluded, in answering various hypothetical questions, that each of the above named persons was an underwriter. It is Duboff's position that this testimony was an illegal usurpation of the function of both the Court and the Jury and that position will be more fully explored hereafter. Her testimony, however, was a patent attempt to adhere as closely as possible to a rigid, literal reading of the language of the statute and to ignore reality. The concept of an underwriter was designed to establish a class of people who, it could be said, by their role in or relationship to a sale of securities, should be subjected to certain obligations or restrictions and should, in effect be deemed to have vouched for or underwritten, for civil liability purposes, the truthfulness of information revealed to purchasers. The term was certainly not intended to apply to persons who, as KAB did here, merely acted as billing agents, or as Duboff and Deutsch did, merely assisted the Company in selling the stock.

However, even assuming that a literal or broad reading of the statute results in a determination that KAB or Deutsch or Duboff may be deemed to be underwriters, it does not follow that their role as underwriters was required to be revealed in the Offering Circular. Although the SEC has adopted guidelines for the preparation of Offering Circulars which include as part of the information to be revealed, the identity of the underwriter, it does not follow that such information is necessarily material in all cases.

Where the underwriter is a broker/dealer and is truly responsible for selling stock pursuant to an underwriting agreement which imposes certain obligations on it the least of which is that it will use its best efforts, and where the prospective purchaser has the right to assume that the underwriter will play a role in creating and maintaining an orderly market in the securities after the underwriting, the identity of the underwriter would certainly be material. However, where the only role of a broker/dealer is to send out confirmations and to collect the proceeds for the Company where he has assumed no responsibility for the sale of the securities and has no intention of becoming involved in the market making process thereafter, his

identity is completely immaterial. Indeed, to identify such a broker/dealer as an underwriter in an Offering Circular would be completely misleading. Even Ruth Appleton, the government's expert conceded this fact. (A583). Her sole reason for deeming the identity of an underwriter a material fact was her anticipated function in supporting the stock in the after-market, a function which KAB clearly was not going to perform. As a result, the conclusion is inescapable that even if KAB could be deemed to be an underwriter, the omission of that information cannot be considered a material omission.

Insofar as Deutsch and Duboff are concerned, exactly the same considerations apply, but even more so. Of what possible significance could it be to a prospective purchaser that they assisted in the sale of the securities. Moreover, in this case, since there were only four investors, and all of them were aware of the roles of KAB, Deutsch and Duboff, it can hardly be said that they were misled.

With regard to the question of compensation, there is similarly no materiality as to the identity of the recipient. The Offering Circular clearly indicated that underwriters might be used, in which event, their compensation would be limited to $1.00 per share, (G. E. 5L) (A1750-A1765). Although there is a question about the propriety of the form of the compensation received by KAB, and if Shwidock is to be believed, by Deutsch and Duboff, the aggregate compensation received in all forms, was substantially less than the limit referred to in the Offering Circular.

In summary, while it may be conceded that the procedures followed by all involved, including the attorney, were sloppy, there was no omission from the Offering Circular of any material fact with regard to the identity of underwriters.

The third misrepresentation alleged and which was never seriously pressed by the government was that the Offering Circular falsely stated that the proceeds would be determined by the market and could be as high as $300,000 when a determination had already been made that the proceeds would be only

$280,000. The evidence fails totally to support this assertion. There was no testimony to establish that $28 was not an appropriate price or that any higher price could have been obtained in the market. Moreover, the price of $28 was a net price after deduction of compensation to KAB so that the total difference in proceeds was only a little more than $10,000, which is certainly not a material difference. Finally, in view of the small number of purchasers and their identity, it can hardly be said that this fact was material so far as they were concerned.

It must be recalled in considering the materiality of any of the alleged misrepresentations or omissions, that this was not an offering made to the general public. Facts which might be material in such a case are not material when only four purchasers are involved.

As a fourth alleged misrepresentation, the government charges that the Offering Circular was false when it stated that the offering was to be made by officers, directors and employees of the company. This charge requires little comment. There is no evidence that such was not the intention when the Offering Circular was filed nor did the evidence establish when or why, prior to March, 1969, the decision was changed. Moreover, the Offering Circular clearly stated that underwriters might be used, in which event an amendment (necessarily after the fact) would be filed. The failure to file such an amendment, the fault of Malmon, certainly does not make the original Offering Circular false.

The final misrepresentation charged was the alleged failure of the Offering Circular to reveal that Deutsch and Duboff had received in the past and would receive in the future, compensation in the form of options and stock, for services to Richards, including the offering. The evidence again completely fails to support this charge. The only evidence adduced was the testimony of Malmon that at Cohen's request, in September, 1968, he caused certain options to be issued to Deutsch, Duboff and others for past and future services to Richards of a financial nature in connection with its franchise program. (A122, A128) And that again at Cohen's request, he had arranged for the

transfer of some stock of Richards from Cohen and his brother to Deutsch and Duboff. The existence of the options and that fact that they were issued as compensation was revealed in the Offering Circular. There was no testimony to indicate that they were in any way related to the offerings. The stock was transferred subsequent to the offering and there was no evidence of a prior agreement or of any connection between the transfer of the stock and the offering.

TRANSACTIONS WITH KAB

A second category of violations with which defendants were charged relates to their dealings with KAB, through Shwidock, from September, 1968 through February, 1969. It is the position of the government that through control of KAB, defendants were manipulating the price of Richards stock. An examination of the evidence fails to reveal any basis whatsoever for this charge.

A manipulation may be defined as an activity whose sole or primary purpose is to affect the market price of a security. *Crane Company v. Westinghouse Air Brake Company,* 419 F.2d. 787 (2d. Cir., 1969); Federal Corp. 25 S.E.C. 227 (1947). Quite obviously, almost any act or statement relating to a publicly traded security or the company will have some tendency to affect, beneficially or adversely, the price of the security. The test, therefore, in this case must be, not whether an act or statement caused the price of Richards to rise, as the government charges, but rather, whether the primary purpose of that act was to cause such a rise. If the purpose of the act was primarily a valid, economic one, its impact on the price of the stock is immaterial.

The testimony of Shwidock, the only testimony bearing on a manipulation by the use of KAB, was very limited on the subject. He stated that in September, 1968, in anticipation of commencement of business by KAB, he communicated with Deutsch and Duboff in an attempt to get business. (A329-A330). In a subsequent conversation, they told him that they handled a large volume of business which they would handle through KAB in return for a share of KAB's profits. (A333-A340) Eventually arrangements were made for him to trade Richards with Deutsch and Duboff telling him how and when to buy and sell. At that

time, Jaffee & Co., by whom Deutsch and Duboff were employed, did not trade stocks. (A414)

Thereafter, Shwidock submitted daily bid and asked quotation through the "pink sheets" after discussing his prices with either Deutsch or Duboff who either agreed or told him to go up or down. (A335-A340) Before speaking with Deutsch and Duboff, Shwidock checked the prices being quoted by other brokers. (A420) The only consideration in setting prices, according to Shwidock, was the best price at which to buy or sell. (A420) When he sold or purchased stock, he would receive a call from Deutsch or Duboff telling him to whom he was selling or from whom he was purchasing and at what price, and he would then call the broker to confirm. (A335-A340) They never told him to pay more for stock than the best price he could get it for. (A421)

This was the substance of Shwidock's direct testimony as to his trading activity. Where, on the basis of his testimony, is there evidence of manipulation? At no point was there any indication that any of the transactions which be handled were other than bona fide transactions. At no point was there the slightest indication that the price at which any sale or purchase took place was determined other than by negotiation or that it was determined for the purpose of affecting the market price.

Any doubt about the nature of KAB's activities were resolved by Shwidock's testimony on cross-examination. In the first place, Shwidock stated unequivocally that he did not believe he was doing anything improper when he handled these transactions (A418).

He also stated that as a general rule, brokerage firms like Jaffee & Co. which specialize in buying and selling stocks for customers and do not make markets in those stocks, turn to trading firms like KAB to purchase or sell stock for them. (A413-A414)

Moreover, since it was well known on Wall Street that Deutsch and Duboff had an active interest in and were assisting Richards, it would be a common practice for other brokers interested in buying or selling stock to communicate with Jaffee

& Co. to find out where they could buy or sell. (A415-A416) These firms could not directly buy from or sell to Jaffee & Co., since it was not making a market in the stock. (A416)

In the absence of any evidence tnat any of the transactions were not bona fide and since they all were executed at the best possible price, on what basis can it be argued that a manipulation was involved?

Not only does the uncontradicted testimony fail to show a manipulation, the objective evidence in the form of the trading activity itself, clearly establishes the contrary. At the trial, the trading records of KAB were available and were identified by Shwidock who testified to their contents. (A447-A462) These records reveal that during the six month period from September 13, 1968 to March 14, 1969, during which KAB was trading the stock, only 16,200 shares of Richards were purchased and only approximately 14,000 shares were sold. Since 100,000 shares were publicly traded, these transactions represent a relatively small proportion of the available stock. However, even these figures grossly overstate the facts since 10,000 of the shares purchased and sold consisted of two 5,000 share blocks purchased from Jaffee & Co. in October, 1968 at $28 per share and sold immediately at $31 per share. (A448-A449)

An analysis of these transactions reveals clearly that they were not manipualtive. With respect to the 10,000 shares, it is inconceivable that it could be urged that a sale of that large a block below the market and its resale in the market could have the effect of raising or supporting the price. Shwidock, himself, testified that such a sale would have a tendency to cause the price to drop. (A450) In addition, since 8,500 of these shares were sold to major brokerage firms, (A451), there is no basis for any inference that the sales were other than bona fide.

The remaining 6,200 shares purchased by KAB during the six month period were hardly sufficient to have an impact on the price. In any event, the prices paid were such as to completely negative any inference of manipulation.

In September, 1968, 900 shares were purchased at 30 and 31.

In October, 1968, 185 shares were purchased.

In November, 1968, 100 shares were purchased.

In December, 1968, 1,200 shares were purchased at 27 and 28.

In January, 1969, 3,000 shares were purchased at decreasing prices which dropped as low as $21 per share.

From February 1, 1969 to February 25, 1969, 1,000 shares were purchased between 30 and 35 with the last purchase at 30.

From February 25, 1969 to March 14, 1969, the date of the first sale of the public offering, no shares were purchased.

The foregoing figures, it is submitted, speak for themselves and establish, without question, that no manipulation occurred.

If more evidence be needed to establish the absence of any manipulation, it can be derived from the failure of Duboff to use such a manipulation to profit personally or to benefit his father-in-law. The only transactions in Richards stock was the purchase by William Harris of 1500 shares of the Regulation A offering which was sold at a three point profit (A376-A378) and a sale by William Harris of 600 shares in January, 1969 for a small profit. It is interesting to note that the sales were made at prices of $22 and $25 per share, almost the lowest prices at which the stock sold during the two year period of the alleged manipulation. (A464-A466) If Deutsch and Duboff really controlled the stock and were really engaged in a manipulation, would they not have taken advantage of their position to realize trading profits?

The fact is, that there was no manipulative activity so far as KAB was concerned.

THE MUTUAL FUND TRANSACTIONS

The next category of violations charged is the manipulation allegedly involved in the purchases by the three mutual funds. The indictment charges that the defendants induced the mutual funds to purchase stock for the purpose of restricting the available supply of stock and in order to create the appearance of activity. The evidence at the trial established nothing of the sort.

Thus, both Deane and Hurley testified that Hurley sought out Deutsch rather than vice versa. (A255-A256, A606-A607) Hurley then stated that at a meeting in February 1969, he and

Deutsch discussed various companies in which Deutsch was interested, devoting approximately five minutes to Richards. (A610) Deutsch gave Hurley some large income projections two and three years in the future and said that there would be 60 franchises built by 1970. (A610) Subsequently, in a telephone conversation in February or March, 1969, Deutsch told Hurley that shares in the public offering were available and said the fund would do very well with it. (A616) Thereafter, Financial Venture Fund, Hurley's fund, purchased 5,000 shares. (A616)

In April, 1969, Hurley and Robert Anton met Cohen in Las Vegas. (A616-A617) Cohen told him how the restaurants would operate, that 20 were sold and it looked like many more could be sold and it looked like the business would be a success. (A619) Hurley then called Deutsch in April or May, 1969, told him he was very impressed with Cohen and the prospects for Richards and that he and Robert Anton, the head of Financial Dynamics Fund would be interested in seeing all of the Richards stock Deutsch could show them. (A620-A621)

Thereafter, from March, 1969 through September, 1969, Financial Venture Fund purchased approximately $1,500,000 of Richards. (G.E. 49) (A1889-A1892) Commencing at the end of April, 1969 until January, 1970, Financial Dynamics Fund purchased approximately $1,500,000 of Richards. (G.E. 49) (A1889-A1892) Finally, from December, 1969, to April, 1970, a third fund, Financial Industrial Fund purchased approximately $1,500,000 of Richards. (G.E. 49) (A1889-A1892) By April, 1970, the three funds owned, in the aggregate, approximately 75% of the available public shares. There was no testimony to indicate that either Deutsch or Cohen ever met or spoke with James Frankenthaler, the manager of Financial Industrial Fund.

On the basis of this testimony, it is clear that nobody induced the mutual funds to purchase stock. The decision to purchase and to purchase in volume was that of the fund managers alone. The only role played by Deutsch and Duboff was to act as brokers in effecting the purchases, for which they earned commissions.

In all of this, it should be noted that Duboff never met anyone from the funds and never discussed Richards with anyone.

Confronted with the absence of any evidence that Deutsch and Duboff had induced the funds to purchase any stock, the government sought to remedy this deficiency in its case by propounding the theory that the inducement was accomplished by misrepresenting facts to the fund managers. This position constitutes an outrageous distortion of the language of the indictment, an impermissible variance from and amendment of the charges and has no support in the evidence.

The only evidence relating to representations allegedly made to any of the fund managers was as follows:

Hurley testified that in February, 1969, he was given earnings' projections of $2.50 and $5.00 per share for the second and third year of operations respectively. (A610), and that in July, 1969, he was told that there were roughly 100 franchises ready to be sold and in response to his statement that it would take some money to build the units, he was told by Deutsch that they probably had a union pension fund. (A626-A628)

Giasafakis testified that Deutsch told him in July, 1969 that 200 franchises had been sold (A845); that he had seen copies of several press releases (A851-A852) and that the procedure at the funds was to distribute these press releases to fund managers (A853); and that there were frequent conferences among the fund managers during the course of which Richards was discussed and telephone conversations between Deutsch and Hurley were referred to although he was unable to recall the content of any of those discussions or conversations. (A859)

Aside from the fact that there is not one word of testimony to indicate that these minimal representations were made for the purpose of or had the effect of inducing anyone to buy the stock, there is no evidence that any of the statements were false.

Insofar as the earnings projections were concerned, Hurley stated that he understood that these were merely estimates which assumed the successful accomplishment of many steps. (A737-

A738) Hurley was looking for small, speculative investments with high potential although he recognized that such investments were very risky. (A734-A735)

He knew that Richards had not yet really started and that whether or not it made money would be dependent upon many factors. (A737) In light of this testimony, to say that Hurley was induced to purchase by virtue of these representations is sheer nonsense.

Although Giasafakis testified that he was told in July, 1969 that 200 franchises had been sold, Hurley testified that in the same month, he was told that 100 were probably sold so that the statement to Giasafakis, if believed, can be ignored. There is no evidence that 100 franchises were not sold as of July, 1969.

With respect to the probable availability of a union pensions fund, there is again no evidence that such was not the fact at the time the statement was made.

Finally, with respect to the press releases, with the exception of the release in April, 1970 (G.E. 25G) (A1881), which refers to the sale of 210 franchises, there is nothing in any of them which could be deemed to be a misrepresentation even if the inference may be indulged that the releases were read by and had some influence on the fund managers.

The first release was May 7, 1969 and merely announced a stock dividend. (G.E. 31A) (A1876) On May 15, 1969, a private sale of stock to Value Line was announced and commitments for 19 units were reported. (G.E. 31B) (A1877) On July 16, 1969, Richards announced an acquisition and repeated the report of its sale of 19 franchises. (G.E. 31C) (A1878) This directly contradicts Hurley's recollection and Giasafakis' recollection about the number of franchises reported sold in July, 1969.

On August 18, 1969, the acquisition of stock in another company was announced and Richards reported that now 23 franchises had been sold. (G.E. 31D). (A1879) The release of October 14, 1969 announced the appointment of Kally and reported that Richards had now sold 49 franchises. (G.E. 31E) (A1880) On January 22, 1970, Richards announced a tender offer.

Despite all of the emphasis placed by the government and the court on these releases, there is absolutely no evidence indicating that any statements made were, in any way, inaccurate.

Insofar as the April 6, 1970 release is concerned, even if it were conceded that the statement that 210 franchises had been sold, was inaccurate, that press release can hardly have been an inducement to the funds to purchase since, by that date, two funds had discontinued purchasing and the third fund had virtually concluded its purchases.

Thus, it is clear that whatever the reasons of Hurley or the other fund managers for purchasing Richards stock, there is no evidence to support the conclusion that they were induced to make those purchases by any misrepresentations made to them by any defendant.

The court admitted testimony by Giasafakis about meetings among the fund managers despite Giasafakis' inability to recall even the substance of any of those conversations on the theory that inferences could be drawn, that false representations were made to Hurley by Deutsch which were passed on to the fund managers. It is submitted that the admission of this evidence was highly improper but in any event, any inference from such testimony is wholly impermissible.

A further gap, however, appears in the government's case. Even if it be assumed or inferred that certain representations made by Deutsch to Hurley or which were contained in the press releases were false and played a role in inducing the funds to purchase stock, there is absolutely no evidence that Deutsch or Duboff knowingly and wilfully misrepresented. While there was some testimony indicating that Deutsch and Duboff acted as financial consultants for Richards with respect to obtaining financing and providing general financial advice, there was no evidence that they were at any time, aware of the details of Richards' operations. The basis for the government's and the court's conclusions that the evidence was sufficient for the jury to consider was the inference claimed to be permissible that Deutsch because of his relationship as a financial consultant must have been aware of the true facts and further, that Duboff,

because of his association with Deutsch, must have been aware of the false representations.

A criminal conviction cannot be sustained by such an improper use of inferences. The law is clear in the first place that an inference may not be piled upon another inference in order to arrive at a finding of fact. *Pisano v. S.S. Benny Skou*, 220 F. Supp. 902 (S.D.N.Y., 1963), aff'd. 346 F.2d. 993, *cert. denied* 382 U.S. 938.

In this case, the jury was permitted to determine that Duboff knowing participated in a misrepresentation in order to induce the funds to purchase on the basis of the following inferences.

(a) That Hurley was induced to buy by statements made to him by Deutsch;

(b) That in telephone conversations thereafter with Deutsch, misrepresentations were made;

(c) That those misrepresentations were communicated to other fund managers;

(d) That the various fund managers read the press releases;

(e) That continuing purchases by Hurley and purchases by other fund managers were caused by information derived from Deutsch or the press releases;

(f) That the information was false;

(g) That Deutsch, because he was a financial consultant, knew the information was false; and,

(h) That Duboff, because of his relationship with Deutsch, was responsible for the false statements.

Aside from the placing of inference upon inference, the jury verdict was impermissible because with respect to each inference, the facts from which the inference were permitted to be drawn were susceptible of two inferences, one of which was consistent with innocence. Where two such conflicting inferences are possible, it cannot be said that proof exists beyond a reasonable doubt.

In any event, Hurley testified that he never attempted, through purchases of stock of Richards to drive the price up.

Despite the fact that he was named as a co-conspirator, he stated that he never agreed with Deutsch or anyone else to attempt to raise the price of Richards stock. On the contrary, he testified he discussed with Deutsch methods of purchasing stock carefully so as to conceal from the public that the funds were buying heavily. (A768) He also testified that he knew that Jaffee & Co. did not make a market in Richards and that, therefore, they would go to other brokerage firms with whom Deutsch had a good relationship in order to acquire the stock at a better price. (A768-A769)

As inequitable as the result may be in drawing the inferences sought by the government with respect to Deutsch, they are magnified many fold when those same inferences are sought to be applied to Duboff. Duboff never spoke to anyone at the fund. Duboff never made any representations about Richards to anybody. There was no testimony that Duboff was present at any meetings or had any knowledge whatsoever about the operations of Richards. Inferences with respect to Duboff were based exclusively on the facts that he was Deutsch's partner and was involved in filling orders for the fund and on evidence admitted during the testimony of Ronald Frankel, an officer of the financial public relations firm which issued the press releases, in the form of a telephone message slip purportedly indicating that Duboff had called to make a minor correction in one of the press releases. (G.E. 37) (A1883-A1884) While it will be contended in a subsequent point that the admission of this telephone message slip constituted prejudicial, reversible error, even if the slip is accepted as proper evidence, there is no basis for the inference sought to be drawn by the government. The correction referred to in the message slip had to do with the capital structure of Richards with which it may easily be assumed Deutsch and Duboff were familiar in their role as financial consultants. It is completely illogical to infer from the fact that Duboff had reviewed a press release and had corrected a piece of misinformation about the company's capital structure that he was completely familiar with the business affairs of Richards and accordingly, that he was criminally responsible for any

misrepresentations made by any person in any form.

In view of the foregoing, since the evidence completely fails to establish that Duboff directly or indirectly was responsible for misrepresentations to the fund, his conviction cannot stand.

However, regardless of whether or not Duboff or anyone else may be deemed to have induced the funds to purchase Richards stock, the evidence fails to establish any manipulation or manipulative purpose.

Hurley denied that he was manipulating the stock and denied that there was any such understanding or agreement with Deutsch and Duboff. Beyond that, however, an examination of the orders received from the fund and the manner in which those orders were filled illustrates beyond cavil that there was in fact no manipulation.

The fund orders were given on each occasion in large amounts either at a fixed price, as "market orders" which meant that Deutsch or Duboff could buy at the best immediate market regardless of price (A1392) or as "market not held" orders which meant that Deutsch and Duboff had the discretion to buy at the best market price available or to refrain from buying if they believed that the market would go down. (A1393)

An examination of these fund orders is, therefore, most illustrative since almost all orders were either "market orders" or "market not held" orders, giving Deutsch and Duboff tremendous discretion and tremendous power to buy so as to raise the price.

Thus, the first order of Financial Venture Fund was given on March 18, 1969 for 20,000 shares at a fixed price of $34. This meant that Deutsch and Duboff were authorized to buy immediately, 20,000 shares at $34 per share. If they were seeking to cause a price rise, this, of course, is what they would have done.

In fact, however, they did nothing of the sort. Instead, they devoted three weeks to acquiring the stock and bought all but 2,500 shares at prices lower than $34. The weighted average price of these purchases was only $31.25 per share. Moreover, although they paid as much as $34 for 2,500 shares on March 21, 24 and 25, 1969, they thereafter purchased 3,300 shares at lower

prices, in one case as low as $31. (Duboff Exhibit Y) (A2177-A2190).

A similar pattern is revealed on all of the other orders. On April 21, 1969, they received an order for 5,000 shares at $34 to $35. They filled 1,900 shares of this order at $32 and $33.

On May 7, 1969, they received a market not held order for 15,000 shares from Financial Venture Fund. Despite their unlimited authority, they purchased only 4,800 shares of this order over a period of one month at which time the balance of the order was cancelled.

A market not held order of 13,000 shares on June 13, 1969 for FVF was filled only to the extent of 7,300 shares over a period of 1-½ months. A market not held order for Financial Dynamics Fund (FDF) of 20,000 shares on April 29, 1969 was filled only to the extent of 10,400 shares over a period of five weeks. An FDF market not held order for 8,775 shares on July 10, 1969 was filled over a two month period only to the extent of 6,225 shares and at much lower prices in the later portion of the period.

The same buying pattern is evident throughout as an examination of Duboff's Exhibit Y (A2177-A2190) will reveal. In every case, despite large orders and virtually unlimited authority, Duboff and Deutsch purchased conservately and at the lowest prices they could get. They clearly refrained from excessive buying which would tend to push up the prices. In many cases they purchased at lower prices than previous purchases.

As further evidence that the purchases by the fund were not used by Deutsch and Duboff for the purpose of manipulating the price, reference should be had to the testimony of Paul Mazzeo, who was also named as a co-conspirator and testified as a government witness about purchases made by Deutsch and Duboff for the funds through V.F. Naddeo & Co. Mazzeo, after denying that he had done anything improper, (A1012-A1013) or that he had engaged in any agreement with anybody to manipulate the price of Richards stock (A1024-A1025) testified that by making purchases through him rather than directly, Deutsch and Duboff were obtaining the best possible prices and

preventing the stock from being pushed up. Mazzeo testified that if Deutsch and Duboff, with an order to purchase a large block were to openly fill this order, word that they were interested would result in the price rising rapidly. (A1006-A1007)

In addition, by purchasing directly from market makers, Deutsch and Duboff would be forced to pay the offering price submitted by the various brokers. (A1011) On the other hand, Mazzeo testified, if Deutsch and Duboff gave him an order, he, by raising his bid by a quarter or a half point, would be able to acquire stock at the bid price and then turn it over to Deutsch and Duboff at a quarter or a half a point profit. (A1010-A1011) Thus, he would be able to conceal their interest in the stock from the general market and at the same time obtain stock at prices substantially lower than the offering price which they would be required to pay if they attempted to purchase directly.

Leonard Mayer, who was called by defendants as an expert summed it all up. A non-market maker, like Jaffee & Co., wanting to make a large purchase would leave the order with a market maker to conceal it from the market making community and not drive up the price. (A1406) In that way the purchase could be made close to the bid and not the offer. (A1419-A1420) Moreover, if an inquiry was received from another firm, a firm like Jaffee & Co. in order to conceal its interest would refer the seller to a market maker with which it had a relationship to act as a middleman. (A1419-A1420) Although, Mazzeo testified on direct examination that Deutsch and Duboff directed him to various brokerage houses on occasion, on cross-examination he conceded that of all the firms with which he dealt, he was directed only to two. (A1031-A1032) An examination of V.F. Naddeo's trading records, (G.E. 86) (A2021) will show that purchases from those two firms were minimal.

Finally, while Deutsch and Duboff asked to be shown any stock that was available, they did not always buy what was shown, nor did they accept the price without negotiation. (A1022-A1023)

Despite the government's burden of proof, no attempt was made by Filmore, a government agent to determine the selling

activity and prices of other brokers while Naddeo & Co. was trading the stock. (A1215-A1219)

Under all of the foregoing circumstances, it is submitted that there is no evidence that Deutsch and Duboff were engaged in a manipulation through purchases by the mutual funds. They did notinduce the funds to purchase. Their representations or at least Deutsch's representations to the funds were not false. If they were erroneous, there is no evidence that they were made with knowledge of the errors or with any bad intent. There is no evidence that the funds purchased because of these representations. Finally, there is no evidence that the purchases were effected in a manipulative fashion.

THE MISREPRESENTATIONS

One of the critical aspects of the trial was the testimony relating to alleged misrepresentations made by Deutsch and Cohen both orally and in the form of press releases issued to the public. As had been previously argued, not one of these misrepresentations was specifically charged in the Information and it is the position of Duboff that they were improperly admitted in evidence. However, even if it be held that it was proper for the government to introduce evidence with respect to alleged misrepresentations, it is Duboff's contention that the evidence failed completely to establish that the representations were false; if they were inaccurate, that Deutsch had knowledge of any inaccuracies; or that Duboff had any knowledge that the representations were being made.

The first and most critical misrepresentation charged related to the number of franchises for fast-food restaurants sold by Richards at various points in time. Hurley said that in February or March, 1969, he was told in April, 1969 that 20 had been sold (A619) and in July, 1969 that probably 100 were ready to be sold (A626). Giasafakis, on the other hand, stated that he had been told in July, 1969 that 200 franchises were sold. (A845). The reliability of this testimony is highly doubtful, however, in view of the fact that the press release of July, 1969 (G.E. 31C) (A1878) states that 20 franchises had been sold and

the press release of August 15, 1969 (G.E. 31D) (A1879) states that 24 franchises have been sold.

Gerald O'Meara of Value Line identified a letter from Cohen dated March 17, 1970 (G.E. 4) (A1749) which stated that as of February 3, 1970, 60 franchises had been sold, 110 as of February 19, 1970 and 200 as of March 4, 1970. The court charged the jury, however, that O'Meara's testimony was not to be considered as evidence of any of the charges, but was merely being admitted as background. (A1599). Finally, a press release issued on April 6, 1970, reported that 210 franchises had been sold. (G.E. 25G). (A1881)

The government's only evidence in support of its position that these representations were false, was the testimony of Joseph Kally (hereinafter "Kally") who had been retained as Vice President of Richards and President of Richards Franchise Investments, Inc., a subsidiary for the purpose of handling real estate, the annual report for the year ended June 30, 1970 and the testimony of the accountant who prepared that report.

Kally, since he did not join Richards until September, 1969 was in no position to testify as to the number of franchises which had been sold as of February, March or July, 1969. (A898-A899) Kally identified a memo which he received from Cohen which listed franchises as of February 13, 1970. (G.E. 65) (A1894). This report, which admittedly was not complete, referred to 32 units and 18 options and then identified two franchises without indicating the number of units.

The annual report for June 30, 1970 showed a relatively small number of franchises as having been sold, but the accountant testified that the financial statement included only those franchises for which payment had been actually made. (A1160-A1162)

Kally also testified to conversations with Cohen in February, March and May, 1970 about problems with various franchises and Cohen's decision to terminate certain franchise agreements. (A920-A921, A923-A926) It was never clearly established, however, exactly how many franchises were sold at any particular time.

The defense presented the testimony of Deane Faris, who was in charge of sales for Richards in the United States. Faris who was no longer with Richards and had no interest in the outcome of the trial testified to the number of franchises sold as of various dates and his figures corroborated the figures used in the press releases. He stated that as of March, 1970, 170 franchises had been sold, exclusive of Canada and Puerto Rico (A1284, A1288-A1289) Most important, Faris testified that information on the number of franchises sold came from him and that when he reported to Cohen about the number of franchises sold, he treated as sold that number of franchises covered by a particular contract including those as to which the franchisee's obligation did not arise until after completion of the first restaurants or as to which the franchisee had an option. (A1279-A1281) This method of counting had been used by other companies with which he had been associated. (A1314)

It thus appear that the evidence was not only far from clear as to the number of franchises sold as of any date, but also that it related only to February, March or April, 1970, many months after the funds commenced purchased. There was no testimony indicating the number of franchises which had been sold in February, March or July, 1969. Accordingly, with the possible exception of the press release of April 6, 1970, there was no evidence tending to establish that any of the representations made by Deutsch or Cohen with respect to the number of franchises sold were false. Insofar as the press release of April, 1970 is concerned, it is clear that this press release played no role in inducing the purchases of stock by the funds since as of the date of the press release, they had for all intents and purposes completed their purchases of stock. When these facts are coupled with the complete absence of any evidence that Duboff or Deutsch were privy to the internal affairs of Richards, and the testimony of Faris that he, in good faith, was responsible for the figures of franchises sold, it is inconceivable that it can be concluded, beyond a reasonable doubt, that they participated in the knowing dissemination of false information. This is par-

ticularly true of Duboff who never even made any statement or was present when it was made.

Another alleged misrepresentation related to the availability of a loan commitment for an amount variously described as $15,000,000 to $25,000,000 for constructing the franchised restaurants. There were several witnesses who testified to having been advised at one time or another that a commitment had been obtained or was going to be obtained for a large loan. The only testimony or evidence introduced for the purpose of establishing that that representation was false was evidence that such a loan had never in fact been obtained. Since loan commitments are at best conditional in nature, there is no logical basis for concluding that failure to obtain a loan is evidence that a commitment never existed. Certainly it cannot be deemed to establish that fact beyond a reasonable doubt.

The prejudice to the defendants from the failure of the Information to particularize the alleged misrepresentations is highlighted by the problems they confronted in refuting this particular charge. When it became apparent, during the course of the trial that the Government was contending that this was one of the misrepresentations being charged, attempts were made to locate and subpoena a witness who had obtained the commitment. When he was finally located, a few days before the trial concluded, defendants were unable to effect service of a subpoena in time.

In addition to the foregoing, the government took the position during the trial that the Information encompassed a charge that publication of the company's annual report and financial statement for the year ended June 30, 1969 was intentionally delayed in order to prevent the public from becoming aware of the company's financial position. This report was not issued until April, 1970. Of course, there was not one word in the Information to indicate to the defendants that such a charge was being leveled at them.

This charge, however, was completely refuted by the testimony of William Louder of the firm of Coopers Lybrand whose firm prepared the financial statement for that year. He

stated that because of acquisitions and inventory problems, the field audit was not completed until the latter part of December, 1969. (A1351-A1352) Thereafter, he testified that because of accounting problems created by new rulings by the American Institute of Certified Public Accountants and events which occurred after December, 1969, the accountants were unable to finalize their report until April, 1970. (A1349-A1350, A1354-A1356) It thus appears clearly that at least as late as April, 1970, the failure to provide an annual report to stockholders was not the result of an intentional delay on the part of the company but rather was a result of the inability of the accountants to complete their work any earlier.

The government sought to bolster its case through the testimony of Ronald Bass, an official of the financial public relations firm, who identified a letter of March 19, 1970 received from Cohen requesting that he not mail the annual report to the media after it was completed and advising that Richards would arrange for the mailing to stockholders. The inference the government sought to draw from this was that Cohen wanted to hold back the delivery of the annual report even after it was received in April, 1970.

To refute this inference, Cohen called as a witness the secretary employed by Richards who had been instructed to mail the annual reports the moment they were received and who testified that that was what in fact was done. (A1266) In rebuttal, the government introduced the testimony of one witness to the effect that he had not received his annual report until July, 1970. It is submitted that this last piece of testimony by one witness who received his report in July, 1970 when it was apparently ready sometime in April, 1970 is hardly sufficient to establish a criminal conspiracy to delay publication of the annual report in order to prevent stockholders from learning about the company's financial condition. Moreover, Kally testified that he distributed copies of the report to certain franchisees in May, 1969. (A927-A929)

In any event, whatever transpired after April, 1970 is immaterial, since prior to that date virtually all of the purchases

alleged to have been the result of misrepresentations had already taken place.

Another area of misrepresentation not identified in the Information consisted of allegedly false and misleading press releases issued during 1969 and 1970.

A review of these releases reveals, however, with one possible exception, not one misstatement. The first one, dated May 7, 1969 merely announces a stock dividend. (G.E. 31A) (A1876). The release of May 15, 1969 announces accurately the Value Line private placement, the opening of the first restaurant in July, 1969 and commitments from 19 prospective franchisees. (G.E. 31B) (A1877). The July 16, 1969 release announces the acquisition of a company which builds dune buggies and then repeats the announcement of the opening of the first restaurant and the sale of 19 additional franchises. (G.E. 31C) (A1878) On August 18, 1969, Richards announced the acquisition of stock of Bill Cosby Foods, Inc. and the existence of commitments for 23 franchises. (G.E. 31D) (A1879) On October 14, 1969, the appointment of Kally as Executive Vice President was announced together with a statement that agreements had been signed to establish 49 franchises. (G.E. 31E) (A1880) The only item in the release of January 22, 1970 dealt with a tender offer for stock of a subsidiary, Richard Franchise Investment, Inc.

Up to this point, there was no evidence that any of the statements were false. The last release of April 6, 1970 contained the reference to the sale of 210 franchises. As has already been pointed out, the evidence on this score was hardly clear and in any event, this representation occurred after virtually all of the sales to the funds had been completed and at a time when the price of the stock had fallen off substantially. (G.E. 49) (A1889-A1892)

The government, however, with the approval of the court, in an attempt to remedy this situation, contended that the Information could be further expanded to include the charge that the defendants were misleading purchasers of stock by issuing press releases which omitted any reference to adverse information about Richards.

It was the position of the government that in fact Richards was experiencing great difficulties during the period that the press releases were being issued and that the releases should have advised of this fact. In support of its contention, the government offered the testimony of Joseph Kally to the effect that some time after he was employed by Richards in September, 1969, the company experienced difficulty in various places either in locating property or completing construction on schedule. Kally did not testify that the company was in difficult financial condition or that it was in any way being prevented from proceeding with its program. He merely testified to the usual problems which would be faced by a business which involves the acquisition of many sites and construction on those sites. His testimony, in sum, merely indicated that in some situations problems of zoning, construction and land selection were being experienced. On the basis of this testimony, it is inconceivable that it could be argued that defendants were wilfully misleading purchasers.

In any event, even if it be held that some of the statements made or some of the information omitted by Richards in its public relations activities had a tendency to mislead unidentified purchasers of the stock, there is no basis to infer that Duboff had knowledge that misinformation was being disseminated. He was in no way connected either with the business affairs of Richards or with the press releases. Any attempt to infer his guilt from his association with Deutsch is highly improper. Moreover there is not even any evidence that Deutsch was aware of anything misleading in the press releases. There was no evidence that Deutsch at any time visited Richards' offices or plant. The alleged inference that Deutsch, as a financial consultant, must have known the details of the company's operations is completely unwarranted, particularly with respect to the number of franchises allegedly sold. If Faris was reporting to Cohen sales figures based upon an improperly optimistic evaluation of the contracts, how can it be said that Deutsch who was not directly involved in any way in the company's operations should have known that the information was not completely accurate. While

there was testimony that Deutsch received copies of press releases for approval, it is illogical to infer that Deutsch was expected to approve the accuracy of facts concerning the company's activities. Since Deutsch was a financial consultant, it is much more reasonable to assume that the purpose of having Deutsch approve the press releases was to enable him to satisfy himself that data with respect to the company's securities, with which he was familiar, was accurately reflected and also to enable him to satisfy himself as to the format of the press release. Deutsch certainly had a right to rely on the company for the accuracy of the facts contained in the press release.

Another area of alleged misrepresentations related to the aborted acquisition of F & T Meat Packing Company which was referred to in the report prepared by Michael Papworth. (Deutsch Exhibit A). (A2191-A2200) The testimony indicated that while there may have been an agreement in principal, no contract was ever signed and the discussions were eventually terminated. It appears that a sale of F & T Meat to Richards was agreed upon and only after much time had elapsed was it aborted because of a change of mind of one of the two principals. As this Court is well aware, it is common practice for companies to treat acquisitions as consummated when there is an agreement in principal although the final details are not yet worked out and committed to writing.

However, regardless of the accuracy of the statement to Papworth, there is no conceivable justification for using that statement as the basis of a charge of criminal misrepresentation. Such a misrepresentation was not charged in the Information. It was made to Papworth in an informal conversation with no particular motive to lie. It was included in a report which Papworth on his own decided to prepare for his own experience. (A777-A778) Although a copy of the report was given by Deutsch to Hurley, there is no indication that Deutsch or Hurley reviewed it carefully or attached any great significance to the acquisition.

In summary, it is Duboff's position that the evidence failed to establish any misrepresentations; that to the extent any may have been established, there was no proof they were made

wilfully and knowingly; and that so far as he was concerned, since there was no evidence that he made any representations, was present when they were made or was aware that they were being made, he cannot be held responsible for them.

POINT SIX

THE COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING TESTIMONY BY BERNARD SHWIDOCK ABOUT "KICKBACKS" ALLEGEDLY PAID TO DUBOFF AND DEUTSCH.

During the testimony of Bernard Shwidock, he was permitted to testify, over objection, to arrangements allegedly made with Deutsch and Duboff to pay them a percentage of the profits allegedly derived by KAB from trading activities in Richards stock. This testimony was admitted by the court on the theory that it tended to establish a motive for Deutsch and Duboff to manipulate the stock of Richards.

It is the position of Duboff that this testimony had virtually no relevance and that its admission constituted error of such a prejudicial nature as to deprive him of a fair trial.

As has already been discussed in a prior point, Shwidock testified that in September, 1968, he met with Deutsch and Duboff at a time when he was seeking new business for KAB which had just commenced operations. (A329—A332) He testified that he was called to the offices of Deutsch and Duboff where he was told that they could give him substantial business but that they did not give away this much business for nothing and wanted a rebate of 50% of the profits in cash. (A333-340) In this connection, it is interesting to note that no such arrangements were made with V.F. Naddeo, or Allessandrini & Co., with whom Deutsch and Duboff did a very substantial volume of business, after terminating their relationship with KAB.

Thereafter, after conversations with his partner, he

returned and told Duboff and Deutsch that they could work out a 30% cash arrangement and Duboff and Deutsch agreed. They told him that they would tell him how and when to buy and sell. (A333-340)

Shwidock proceeded in accordance with the procedure described earlier, buying and selling stock and making or submitting bids to the pink sheets after discussions with Duboff and Deutsch. It may be recalled that he testified that he did not believe he was doing anything improper (A418) and that they always were trying to get the best price possible in purchasing stock. (A420-A421) There was no evidence that any of the purchases or sales were not bona fide transactions. He then stated that in early October, 1968, he was called to the offices of Deutsch and Duboff and was introduced to Jack Reiss, President of the Reiss Bank in Switzerland. He stated that Deutsch told him that the Reiss Bank was one of their best accounts and that Duboff then suggested that they subscribe to an investment advisory service from the Reiss Bank with payments made for such service to be applied against the 30% payment due to Deutsch and Duboff. Dubcff told him that he figured it would run as high as $10,000 a month. (A342—A345)

Over objection, Shwidock then identified five checks, payable to the Reiss Bank totalling $90,000. (G.E. 24a-24e) (A1862-A1871) Thus the jury was informed of payments of $90,000 although Shwidock testified that Deutsch and Duboff were to receive only $15,000 as their share of profits on trading. Moreover, $45,000 of these payments were made in August, 1969 and January, 1970, long after KAB discontinued trading Richards stock.

Shwidock further testified that the services received were valueless to him but that he continued to pay for them nonetheless pursuant to the arrangements. There was no testimony tending to establish that any of the payments made to the Reiss Bank were for the benefit of Deutsch or Duboff or were ever received by them in any form. The Court recognized that fact in its explanation to the jury, stating that there was no evidence that Deutsch or Duboff received any of this money and

that the evidence of the $90,000 in checks was being admitted in support of the Government's position that this was one way in which defendants received $15,000. (A397) It is submitted that the error in admitting this evidence is amply indicated by this charge which, in effect, admits that there is no basis in law for admitting this evidence.

Shwidock also testified, over objection, to having, upon request, made payments for certain paintings for Duboff and for certain clothing for Deutsch. (A353-A355)

Although the theory on which this evidence was admitted was ostensibly to show a profit motive to manipulate the stock, it, in fact, had no such tendency. The fact that Deutsch and Duboff may have profited from trading transactions is certainly no more consistent with a manipulation than it is with legitimate trading activity. This is particularly true when it is recalled that $45,600 of the $50,000 profit earned from trading derived from the sale of the two 5,000 share blocks at the very outset of the relationship. (A455) While this evidence did not tend logically to support the claim of manipulation, it did have a very prejudicial effect since it tended to establish that Deutsch and Duboff were somehow involved in illicit kickback payments with the jury being permitted to speculate on the reasons for such kickbacks including possible income tax evasion.

In view of the fact that Shwidock's testimony and the records of KAB did not in any way establish the existence of a manipulation and in further view of the fact that the minimal probative value of this evidence was more than outweighed by its severe prejudicial effect, the admission this evidence warrants a reversal.

In effect, the bulk of Shwidock's testimony related to the alleged motive for a manipulation with virtually no evidence tending to establish the fact of such a manipulation. As a result, the tail; i.e., the kickbacks, was permitted to wag the dog; i.e., the manipulation.

POINT SEVEN

THE COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING TESTIMONY WITH RESPECT TO PURCHASES BY FINANCIAL DYNAMICS FUND AND FINANCIAL INDUSTRIAL FUND.

In an attempt to prove a manipulation, the government introduced evidence of purchases by three different funds all under the same management. These funds were Financial Venture Fund, Financial Dynamics Fund and Financial Industrial Fund. The portfolio manager for Financial Venture Fund was Jack Hurley, who testified as a witness at the trial. It has already been argued that the evidence was insufficient to establish that purchases by Hurley were made pursuant to any agreement with Deutsch and Duboff to attempt to affect the price of Richard's stock and that Deutsch and Duboff in fact made every effort to avoid an unusual impact on the price of the stock by reason of the large fund purchases. The same argument, of course, would apply to purchases by the other two funds. However, with respect to those two funds, the objections are more substantial and go much deeper.

There was no testimony whatsoever about the manner in which or the reasons for which the two fund managers of the other two funds became involved with purchasing Richards stock. The manager of one of the funds was Robert Anton and the manager of the other fund was James Frankenthaler. There was no evidence of any conversations between any defendant and Frankenthaler and testimony about only one innoccuous conversation among Hurley, Anton and Cohen. (A616-A618)

The sole basis for the admission of this evidence was testimony by James Giasafakis, an analyst with the funds. He stated that there had been frequent informal meetings of the portfolio managers during which various stocks, including Richards, were discussed, and that at these meetings; Hurley, who had frequent telephone conversations with Deutsch, would report on those conversations. Giasafakis, however could not

recall a single specific fact which was mentioned. (A855-A859)

Giasafakis testified that he had seen copies of some of the press releases issued by Richards and that it was a practice of the fund to distribute to portfolio managers copies of information such as press releases. Accordingly, he stated that he was certain that these press releases had passed across the desks of Anton and Frankenthaler. (A853) On this tenuous basis, the court concluded that the evidence was admissible and that the jury could infer that purchases by Anton and Frankenthaler were induced by representations made by Deutsch in telephone conversations with Hurley and also based upon representations contained in the various press releases. As the court put it, if the funds purchased, it must be assumed that the information from Deutsch was not adverse. (A1261—A1262) Despite the absence of any evidence about the contents of the conversations between Hurley and Deutsch and among Hurley, Anton and Frankenthaler, the Court concluded that the conspiracy operated by Deutsch relaying information to co-conspirator Hurley who then told things to Anton and Frankenthaler as a result of which they made substantial purchases of stock. (A1264)

It is submitted that these inferences are so far-fetched that they cannot be permitted to stand as a basis for the admission of this evidence. Moreover, in the absence of any evidence establishing that Hurley was in fact conspiring with Deutsch and Duboff, any statements made by Hurley to Anton and Frankenthaler could not be binding upon Deutsch and Duboff.

In fact, there is not one word in this lengthy trial to indicate the reason for the purchases by Anton's and Frankenthaler's funds, or the circumstances under which those purchases were made.

Furthermore, an examination of the records of purchases and sales by New Dimensions Securities, Inc., through whom a substantial portion of these purchases were made, indicates clearly that there was no manipulation being practiced. In the first place, although Somer Jack Rothman (hereinafter "Rothman") testified that in telephone conversations with Deutsch and Duboff, he was directed to brokerage firms for the purchase

of Richards stock for resale to Loeb, Rhoades for the account of Jaffee & Company, there was no evidence indicating that these transactions were not *bona fide*, arms length transactions executed at the best available price.

Secondly, despite Rothman's testimony, the records of New Dimensions (A2013—A2018) (G.E. 83) indicate that purchases were not made for resale to Loeb, Rhoades. In fact, New Dimensions maintained a short position in the stock of Richards from the inception of its trading until April 9, 1970, by which time all of the fund purchases had been virtually completed. (A1131) As a result, New Dimensions was always in a risk position since its ability to deliver stock it had sold depended upon its ability to purchase that stock at a lower price.

Finally, an examination of the prices paid by New Dimensions indicates clearly that no attempt was being made to raise the price. Government's Exhibit 83 (A2013—A2018) is a chart of the purchases and sales of Richards by New Dimensions. That chart indicates that New Dimensions first purchase on December 16, 1969, was at 36-1/2, more than three points below the last purchase by V.F. Naddeo & Company on December 2nd at 40. (G. E. 86) (A2021—A2032). The highest price paid by New Dimensions for Richards stock through the end of April, 1970 was 43-1/2 and that price was paid for only a small number of shares. Most of the stock was purchased around 40 to 41. On frequent occasions, New Dimensions lowered the price which it paid for stock from prices paid on previous days. Some examples may be found by referring to purchases on December 17th and 24th, January 7th, 16th, 29th, 30th, February 4th and 10th and March 13th. In addition, commencing on April 3, 1970, New Dimensions' price dropped regularly from 40 to 21-1/2 on April 23, 1970. It is impossible to discern any basis in the records of New Dimensions trading to justify a conclusion that it was done in a manipulative fashion or for a manipulative purpose.

Although it is difficult to determine the basis for the court's conclusion that there was sufficient evidence of manipulation to

submit this question to the jury, colloquy between the court and counsel at pages 4529 to 4531 (A1257—1260) during the course of Duboff's motion to dismiss at the close of the government's case is very enlightening. At that point, in response to counsel's statement that there was no evidence that Deutsch and Duboff participated in a manipulation, the court stated that it must take into account testimony indicating that there was a built-in profit of which the funds were unaware. The court stated that the way the buying was done was criminal with everybody getting his point, half-point and quarter-point. The court continued that in its opinion, brokers dealing with the fund and in explaining the situation to them were breaching their obligation and were in violation of the law unless they can explain it in a satisfactory fashion to the court and jury.

It thus may be concluded that the basis for the court's admission of this evidence was the court's feeling that Deutsch and Duboff and others directly and indirectly were making too large a profit. This, it is submitted, constituted no basis for a conclusion that there was a manipulation. Certainly, in the absence of any charge that any of the defendants were obtaining illegal profits or commissions, the evidence was improperly admitted.

The court then compounded the error committed by admitting this evidence by charging the jury that it could convict the defendants if it found that New Dimensions was earning more than a *normal* profit on its transactions. There is no theory of law which makes it a crime to make a greater than normal profit.

Furthermore, there was no evidence at the trial to indicate what was a normal profit. On the contrary, Mayer, a defense expert, testified that the amount of profit made by a brokerage firm which, of course, is in business to make profit, varies with the risk taken and in the case of a short sale, the risk being large, so is the profit. (A1400—A1401) Here since New Dimensions was short the stock during most of the period involved, the risk was obviously great.

In any event, to permit an unsophisticated jury to speculate

as to the meaning of a normal profit in the absence of any testimony indicating what is normal and allowing that jury to convict if its speculation results in a conclusion that a profit is abnormal is highly prejudicial and completely unjustified. Standing by itself, the error in this charge is alone sufficient to warrant a reversal.

As a result of the admission of this testimony, the jury was permitted to consider the fact that among the three funds, almost 75% of the floating supply of Richards stock was purchased. The first fund which purchased, that is Hurley's fund, had only purchased about 1/3 of the total of the stock purchased by all of the funds. Obviously, therefore, evidence that two additional funds had purchased almost 50% of the float had a serious damaging effect in the eyes of the jury. The impact of this testimony was accentuated by the fact that it then opened the door to substantial evidence about the connection between Deutsch and Duboff and the brokerage firm of New Dimensions through which purchases were made primarily by Frankenthaler and his fund and partially by Anton. If testimony with respect to purchases by the last two funds, that is, Financial Dynamics Fund and Financial Industrial Fund, was improperly admitted, then all of the testimony about the activities of Deutsch and Duboff with respect to New Dimensions Securities was improperly admitted. That point will be separately briefed hereafter.

It is Duboff's position that the admission of evidence of purchases by Financial Dynamics Fund and Financial Industrial Fund in the form of testimony and eventually a chart prepared by a government witness by leaving open to the jury the possibility of a conviction based upon activities of those two funds with which neither Deutsch nor Duboff nor any other defendant were in any way connected created such substantial prejudice as to warrant a reversal. This prejudice was exacerbated by the court's charge to the jury which permitted a conviction solely on the basis of a finding that abnormal profits were derived by New Dimensions by virtue of such purchases.

POINT EIGHT

THE COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING TESTIMONY RELATING TO THE ALLEGED RELATIONSHIP BETWEEN DUBOFF AND NEW DIMENSIONS SECURITIES, INC.

As has been previously stated, substantial purchases of Richards stock were made by the mutual funds controlled by Anton and Frankenthaler through Jaffee & Co. which acquired the stock from New Dimensions. None of the purchases made by Hurley for Financial Venture Fund were made through New Dimensions. Again, as in the case of KAB, in a purported attempt to establish a motive for the alleged manipulation, substantial evidence was introduced and admitted over objection with respect to the relationship between Deutsch and Duboff and New Dimensions for the purpose of establishing that they profited indirectly or directly from activities of New Dimensions.

This evidence was of necessity of a highly prejudicial nature because it tended to establish some sort of undefined illicit activity on the part of Deutsch and Duboff. New Dimensions was a brokerage firm which commenced business in December 1969. (A1061) Its president and sole stockholder was one Stanley Ryback, a named co-conspirator. (A1132) Testimony was adduced establishing that Deutsch and Duboff played a role in the organization of New Dimensions and among other things, Deutsch interviewed Rothman, another named co-conspirator who testified as a witness for a job as cashier for New Dimensions. (A1058-1059) Deutsch, in early 1970, engaged an interior designer for the purpose of designing and decorating town-house offices to be occupied by New Dimensions. (A1228—A1229) In addition, there was evidence that Deutsch and Duboff eventually purchased the town-house in which these alterations and decorations were being done and generally supervised the design and decorating of the building which included, according to the testimony, a bedroom, a sauna and a small pool in the basement. Also, there was testimony that certain furniture for

Duboff's home was paid for with funds of New Dimensions. (A116) All of this evidence was designed to establish that Duboff and Deutsch had indirectly benefited from the profits made by New Dimensions on trading Richards stock.

As in the case of KAB, none of this testimony tended to establish that any of the transactions were not *bona fide* transactions or that they were made at prices or in a manner designed to manipulate or increase the price of the stock.

It requires little thought to perceive that testimony that Deutsch and Duboff while employed as registered representatives of Jaffee & Co., were involved in and interested in the activities of another brokerage firm and that they were spending or causing to be spent substantial sums of money for the purposes of decorating a building owned by them in which this firm was going to do business, created a great deal of prejudice in the eyes of the jury. Sums in the hundreds of thousands of dollars were mentioned by the witnesses. Hundreds of pages of testimony was devoted to the relationship between Deutsch and Duboff and New Dimensions.

The only purpose of this testimony according to the government and the court was to establish that Deutsch and Duboff would somehow profit by activities of New Dimensions. However, any slight probative value was so substantially outweighed by the prejudicial effect of the evidence that the admission of that evidence constituted reversible error. This is particularly true when there was no ev. ence tending to establish that the purchases made by New Dimensions had or were intended to have any manipulative effect.

Moreover, the argument made here ties in to the argument made in the prior point, that is, since the purchases handled by New Dimensions were purchases made by Anton and Frankenthaler with whom Deutsch and Duboff never had any contact, there was no basis for any allegation or inference that those purchases were made pursuant to any form of conspiracy with Deutsch and Duboff.

For all of these reasons, the admission of that testimony into evidence so seriously prejudiced Duboff that a reversal is required.

POINT NINE

THE COURT ERRED IN ADMITTING INTO EVIDENCE A TELEPHONE MESSAGE MEMORANDUM.

During the course of the testimony of Ronald Frankel, a principal of the public relations firm responsible for preparation of Richard's press releases, the court, over objection, admitted into evidence Government's Exhibit 87C (A2033) (A1191—A1192). This exhibit consisted of a draft of the April 6, 1970 press release reporting the sale of 210 franchises, to which was attached a telephone message slip purporting to report a telephone call from Duboff suggesting a correction of an unrelated item in the press release. The message slip was admitted as a busines record exception. The person who prepared the slip was not called as a witness and her identity was never established. (A1186—A1189)

This slip represented the only direct connection between Duboff and the press releases or any of the charged misrepresentations. Its significance in the case is therefore clearly very great and was heightened by the fact that the exhibit was one of the few exhibits called for by the jury. (A1659, A1663)

It is Duboff's contention that the exhibit, at least to the extent that it included the message slip was improperly admitted, to his very substantial prejudice.

28 U.S.C. Section 1732, which governs the admissibility of business records provides that a writing made as a memorandum or record of any act, transaction, occurrence, or event shall be admissible if it was made in the regular course of business and if it was the regular course of such business to make such memorandum or record.

Generally speaking, it is safe to assume, in the absence of contrary evidence, that a telephone message slip is not prepared to memorialize the conversation but rather, is merely a method by which an operator notifies someone of the receipt of a call. In this case, the witness who identified the slip was unable to do

much more than to state that it appeared in his file. More important, however, when the witness was asked whether it was the regular course of business to maintain such documents, his answer was "Not usually, unless they are an important part of a particular release record." (A1190) It thus appears that at least one of the requirements of Section 1732 has not been met.

However, whether or not this message slip may be deemed to be a record kept in the regular course of business, it is inadmissible for the purpose for which it was offered. As this court stated in *Bowman v. Kaufman*, 387 F.2d. 582, 587 (1967):

> "Where a written record of past events is offered in evidence under §1732 as a substitute for a witness' testimony at the trial, there must go with the offer, as an implied qualification under the statute, the assurance that the written record is accurate and trustworthy. United States v. Hickey, 360 F. 2d 127, 143 (7 Cir.), cert. denied 385 U.S. 928, 87 S.Ct. 284, 17 L.Ed. 2d 210 (1966). Although we have repeatedly said that §1732 should be liberally administered and not interpreted in a 'dryly technical way,' Korte v. New York, N.H. & H.R. Co., 191 F.2d 86, 91 (2 Cir.), cert. denied 342 U.S. 868, 72 S.Ct. 108, 96 L.Ed. 652 (1951), this does not mean that any particular business record may be admitted without careful scrutiny of its reliability for the purpose for which it is offered as evidence. Thus literal compliance with the mechanical prerequisites of the statute is not always sufficient to make a record admissible, United States v. Grayson, 166 F.2d 863 (2 Cir. 1948); the records or the circumstances under which they are kept should indicate an 'inherent probability of trustworthiness' for the purpose for which they are offered. LeRoy v. Sabena Belgian World Airlines, 344 F.2d 266, 274 (2 Cir.), cert. denied 382 U.S. 878, 86 S.Ct. 161, 15 L.Ed 2d 119 (1965).

See also *Mitchell v. American Export*, 430 F.2d 1023, 1028 (2d. Cir., 1970).

In this case, the exhibit was offered not to establish merely that a telephone call had been received, but that the call had been received from Duboff. In the absence of any evidence as to who made the memorandum, who, purportedly was at the other end of the line, or whether the person making the memorandum was able to identify the caller, there is no basis for a finding of realiability.

The law is clear that had the person who made the memorandum been called as a witness, she could not have testified to the telephone conversation unless she was able to recognize the voice at the other end or there was some other fact which would confirm the identity of the other party. *United States v. Borrone—Iglar*, 468 F.2d 419 (2d. Cir.—1972).

By admitting this exhibit into evidence, the court below has permitted to be done by indirection that which could not be done directly i.e. permitted evidence of a telephone conversation with Duboff without a proper foundation.

If, as is contended, this evidence was improperly admitted, the prejudicial nature of the evidence is such as to require reversal.

POINT TEN

THE COURT COMMITTED REVERSIBLE ERROR BY PERMITTING EXPERT TESTIMONY ON QUESTIONS OF LAW.

During the course of the trial, the court permitted, over objection, expert testimony by Ruth Appleton, an attorney employed by the Securities and Exchange Commission in charge of the small issues (Regulation A) section of the Washington, D.C. office.

On five separate occasions, Appleton testified as to legal conclusions concerning the definition of an underwriter. At page 1637 (A519), she was asked to tell the court and jury "what an underwriter is?" Over objection and despite the court's admission that this was a mixed question of law and fact, she was

permitted to testify as to her definition of the statutory term as contained in the Securities Action of 1933, Section 2(11). At pages 1687, (A561) 1689, (A563) twice on 1691 (A565) during direct examination and on page 1786 (A590) during recross examination, Appleton testified, over objection, in response to hypothetical questions, that in her opinion a person performing certain acts was an underwriter.

Regardless of what the rule may be concerning the ability of an expert witness to testify to "ultimate issues" of fact (compare *United States v. Spaulding*, 293 U.S. 498 rehearing denied 294 U.S. 731, with *Eastern Transportation Line v. Hope*, 95 U.S. 297), the rule is clear that expert testimony may not replace or usurp the function of the judge in stating the law applicable to a case. *Huff v. United States*, 273 F.2d. 56 (5th Cir., 1959); *Myres v. United States*, 174 F.2d. 329 (8th Cir., 1949); *United States v. Phillips*, 478 F.2d. 743 (5th Cir., 1973); *United States v. Stamps*, 430 F.2d. 33 (5th Cir., 1970).

The facts in the *Huff* and *Phillips* cases are particularly interesting in the light of facts here. *Huff* was a prosecution for smuggling jewelry into the United States. Over the defendant's objection, the District Court permitted a government witness who was a supervisory customs inspector with 28 years of experience to testify concerning his interpretation of the customs laws, statutes, rules and regulations and to give his opinion as to the nature of the jewelry found in the possession of the defendant. The court then stated "Of course, the government cannot in this manner be permitted to substitute its witness for the court in charging the jury as to the applicable law. *7 Wigmore on Evidence*, 3rd. Ed., Section 1952. Nor was the witness' opinion and conclusion admissible as to one of the ultimate facts to be decided by the jury." *Huff v. United States, supra* at 61.

Phillips involves a prosecution for concealing and facilitating transportation and concealment of a narcotic drug. In the course of an examination relating to the government's right to open the parcel in which the drug was concealed, "a postal inspector was permitted to testify as an expert, over objection, that in his opinion, based upon his experience and

postal laws and regulations, the parcel (containing the narcotic) was fourth class (and thus could be opened for inspection)." *United States v. Phillips, supra* at 746.

In a footnote relating to this testimony, the court states "It was error to permit this conclusory testimony on what was either a question of law or a mixed question of law and fact." The court goes on to state that the proper procedure would be to have the government point out to the court the statutes, regulations and case law. This would have had the effect of clarifying questions of law involved. *United States v. Phillips, supra* at 746 n. 6.

In the instant case, defendant Duboff is charged with a material misrepresentation because of the failure of an offering circular to disclose the existence of an alleged underwriter. Whether or not there was an underwriter is a central legal issue upon which the prosecution's case in this area rises or falls. Here, instead of instructions from the judge to the jury to the effect that if certain facts are established beyond a reasonable doubt the jurors should conclude that there was an underwriter, we have instead the "expert" testimony of a senior government attorney stating her opinion that, based on the facts presented in evidence, that there was an underwriter. The weight of this testimony on the jury cannot be overcome by any instructions from the judge relating to credibility or weight. Moreover, the only instruction given by the court advised the jury that the expert's opinion was not binding on them. The court never advised the jury that instructions on the law were to be taken only from the court. (A1610)

The admission of this testimony was highly improper, created substantial prejudice and requires a reversal of the conviction.

POINT ELEVEN

THE COURT'S CHARGE TO THE JURY WAS CONFUSING, INADEQUATE AND IN SOME RESPECTS ERRONEOUS.

As has been urged previously, the failure of the Information or Bill of Particulars adequately to define the charges against Duboff seriously hampered his defense and confused the jury, thereby creating substantial prejudice to Duboff's rights. This confusion and prejudice was severely aggravated by the instructions given by the court to the jury to such an extent that Duboff was deprived of even the semblance of a fair trial.

To the extent that the Information is susceptible of analysis, the charges against defendants may be divided into four categories:

1. Misrepresentations.
2. Manipulation.
3. A scheme to defraud.
4. Filing a false offering circular.

As we have already pointed out, not one of the misrepresentations was spelled out, virtually no details were given describing the nature of the manipulation and the nature of the scheme to defraud was left completely open to speculation. In the absence of any specifications of these charges in the Information substantial portions of the evidence was admitted over objection on the Government's contention that the evidence tended to establish one or more of the charges. The court generally set forth the theory on which it was accepting the evidence on the record. Quite naturally, the Government's contentions, defendants' positions and the court's reasoning was never revealed to the jury since they were all presented at side bar conferences. As a result, the jury heard six weeks of testimony without any basis for associating any particular item of testimony with a particular charge thus leaving it completely free to speculate both as to the exact nature of the specific charges and the relationship of the testimony to the charges.

Not having any guidance during the trial in analyzing and understanding the charges, it might be expected that the court, in its instructions, would have clarified those charges and defined for the jury the facts they were required to find. Unfortunately, the court did no such thing. On the contrary, the court's instructions left the jury virtually free to make its own determination of what were the charges; misstated the positions of the defendants in some respects; created further confusion in the minds of the jurors; and erroneously omitted instructions to which defendants were entitled. The following is a discussion of the specific alleged deficiencies in the court's charge:

MISREPRESENTATION

The most critical area so far as Duboff is concerned related to alleged misrepresentations in connection with the sale of stock. Although the Information failed to specify a single misrepresentation and although defendants were refused any particulars of these misrepresentations, a substantial part of the trial was devoted to evidence of representations of one sort or another. Presumably any or all of these representations could have been the basis for the government's charge of misrepresentation.

As a result of the court's charge, the jury was left completely free to determine, in its own judgment which misrepresentations were charged and on which, if any, misrepresentations they could find Duboff guilty.

The court, after reading to the jury Count One of the Information, the Conspiracy Count, advised the jury that a part of the conspiracy was to violate Section 17 of the Securities Act of 1933 and that Counts Two and Three charged the defendants with violations of that statute. (A1551—A1560) The court then read to the jury Section 17(a) of the Securities Act of 1933 and explained to them that the substance of that statute made it unlawful in the offer or sale of a security to employ the mails or interstate commerce in furtherance of any device, fraudulent scheme, practice or course of business or in any attempt to obtain money through material misrepresentations or through

omissions of a material fact. (A1560—A1561) The court then stated that false representations meant ". . . *any* representations regarding present or past facts, *any* opinion expressed or *any* predictions as to the future which are not made in good faith or which are made in reckless disregard or indifference as to whether the statements are true or false." (A1561) Having left the jury with this very broad definition of misrepresentation, the court then stated as an example that the government contended that Duboff and Cohen through oral statements and press releases made false statements and omitted to state material facts as to the number of franchises sold, referring specifically to the press release of April, 1970, (G. E. 25 G), (A1881), and the reference in that press release to the sale of 210 franchises. (1561—A1562) Having provided the jury with one example of an alleged misrepresentation, the court then opened the door wide for the jury to determine what other misrepresentations might have been charged or proved by stating, "the government made other contentions, which I will leave to your recollection." (A1562)

In the absence of any specific charge in the Information relating to misrepresentations and in the absence of any specific statement in the charge as to the nature of the representations alleged, it is impossible to determine what was the basis for Duboff's conviction. The jury was given the power to use its own judgment in determining what was charged and whether the proof supported what it believed the charges to be, thereby compounding the injustice done to Duboff by the failure of the Information or any Particulars to detail the charges against him.

The court further erred in respect to its charge on representations by failing to advise the jury that the facts allegedly misstated must be material. Although the court did instruct the jury in this respect much later in the charge when discussing the substantive counts, no mention of materiality was made when discussing the conspiracy count.

The court further erred at this point in its charge by failing to advise the jury of the requirement that any misrepresentations must have been knowingly, wilfully and intentionally made.

The court further erred in respect to this charge by failing to instruct the jury that each element, i.e. the making of the statement, the falsity of the statement, the knowledge of its falsity and the intention with which it was made must be established beyond a reasonable doubt.

Finally, the court erred with respect to this charge by asserting in effect that the only contention of the defendants in refutation of the charges was that they believed the statements they made as to the number of franchises sold to be true and that the so-called projections as to future earnings of the company were mere estimates. (A1562) This portion of the charge was specifically excepted to by Duboff who requested that the court instruct the jury that it was Duboff's contention that he never made any of the statements nor was he ever present when they were made nor did he know that they were being made. (A1535—A1536)

This the court refused to do. Moreover, the court refused Duboff's request that the court charge the jury that they must find that the defendants knew the statements to be false and that they could not convict if they found that the defendants had in good faith relied upon information from the company. (A1448)

MANIPULATION

The indictment charged as a further part of the conspiracy that the defendants manipulated the price of Richards stock. With the exception of paragraph 11(g), one of the Means Paragraphs, which alleged that the defendants induced certain mutual funds to purchase stock in order to create activity, the Information was completely silent with respect to the nature of the alleged manipulation. The only instructions of the court relating to the manipulation portion of the Conspiracy Count consisted of the court's statement to the jury that evidence about control of New Dimensions had been admitted primarily to establish that by the use of that control, defendants manipulated the price of Richards stock and a further statement that it was the government's contention that as part of the conspiracy, defendants through control over KAB manipulated the price of

Richards stock. (A1576—A1577) The court then stated with respect to the latter contention, that the jury must find an agreement between Shwidock and the defendants to create buying activity in order to raise or maintain the price or induce others to buy the stock.

The court failed to instruct the jury that it must find the existence of the various elements of a manipulation beyond a reasonable doubt. The court further neglected to define for the jury any of the other alleged charges of manipulation so that again, the jury was given free rein to speculate as to what those charges were and to find defendants guilty on their own interpretation of the charges.

Finally, the court confused the jury by stating that they were to ignore the evidence with respect to New Dimensions if they found that New Dimensions did nothing more than execute orders on which a normal profit was made. As has been previously argued, there is no such thing as a normal profit nor, if there is, was there any evidence from which the jury could determine what is a normal profit.

In addition, the court failed to instruct the jury in any respect with regard to the one specific allegation in the Information relating to the mutual funds and refused Duboff's Request to Charge Number 3 (A1742—A1744) which in substance requested that the jury be advised that to convict they must find:

> (1) That any misrepresentations were intended to induce purchases for manipulations purposes and not to earn commissions,
>
> (2) That the fund managers were manipulating stock in concert with defendants and not on their own,
>
> (3) That large purchases do not constitute a manipulation unless they are made for the purpose of driving up the price.

The failure to charge as requested, coupled with the absence of any clarifying instructions resulted in such a total lack of guidance for the jury that it is impossible to determine what, if anything, was the basis of their verdict.

THE SCHEME TO DEFRAUD

The court further advised the jury that one purpose of the conspiracy was to violate Section 78(j). (A1563) The court then read this section to the jury along with Rule 10B-5 of the Securities and Exchange Commission. (A1563—A1564)

The court then charged the jury that in order to find a defendant guilty of conspiracy, it must find beyond a reasonable doubt, ". . . that sometime between July, 1968 and July, 1970, a conspiracy existed to commit fraud in the purchase and sale of Richard Packing Common Stock". Absolutely nothing further was said by the court as to what fraud was charged to have been committed, what fraud the jury had to find or what were the elements of fraud. Again, as in the case of misrepresentations, the jury was left to its own devices in determining the nature of the fraud with which defendants were charged and the nature of the proof required to establish such fraud.

FALSE OFFERING CIRCULAR

Although the filing of a false offering circular was one of the alleged purposes of the conspiracy, the court in that portion of its charges dealing with the conspiracy made no mention of that aspect of the conspiracy except to the extent of reading the Information to the jury. The court did discuss, however, the charge of filing a false offering circular as set forth in Count Four of the Information but erroneously advised the jury that a description of the basic elements of the charge had been previously explained to them as an earlier part of the court's charge. (A1593)

With respect to Count Four, the court failed with one exception, to instruct the jury as to what were the elements of the crime or that they had to find all of the elements beyond a reasonable doubt.

In this connection, the court denied Duboff's Request No. 1 (A1735—A1736) but stated that the substance of the Request would be included in the court's instructions. The court, however, failed to include any language encompassing the

substance of that request. In the absence of such a charge, the jury was left without any guidance and was again permitted to use its own judgment in deliberating the elements of the crime charged.

That Request read in part as follows:

"In determining the guilt or innocence of the defendants in connection with this aspect of the conspiracy, you must determine the following:

1. Whether or not any information was omitted which the Government claims should have been included.

2. Whether or not there was any obligation to include any of the information which the Government claims was not included.

3. Whether each of the defendants knew that the information was required to be included.

4. Whether each of the defendants was aware of the fact that the information was not being included.

5. Whether the failure to include any such information was intentional and with a wrongful purpose in so far as each defendant is concerned, or whether such failure was the result of a lack of understanding or familiarity with the particular rules involved or was the result of accident or reliance on the guidance and advice of counsel.

Unless you find that one or more of the facts which the Government charges existed, did in fact exist, that a defendant knew of that fact, knew that it was required to be included in the offering circular, knew that it was not included in the offering circular, and was responsible for its exclusion from the offering circular with a wilful and wrongful intention, you must acquit that defendant."

By omitting this charge, the court not only failed to provide any assistance to the jury in understanding the charges but also completely failed to charge the jury on the necessity for a finding of wilful intent on the part of defendants.

A section of the quoted portion of the charge instructed the

jurors to consider whether defendants had relied on the guidance and advice of counsel.

Not only did the court fail to include such a charge, the court limited its charge on the question of reliance on counsel to Cohen charging, only insofar as Cohen was concerned, that if Cohen before taking action sought the advice of counsel in good faith and fairly and accurately represented to his counsel all material facts and acted strictly in accordance with the advice of his counsel, Cohen would not be wilfully doing wrong. (A1596)

It is submitted that the court erred both in limiting this charge to Cohen and more importantly, in limiting the right to rely on counsel to a situation where counsel is rendering an opinion based upon facts presented to him.

There is no question that the court's charge would be, under certain circumstances, an appropriate charge where a defendant sets up as a defense to negative the element of intent, his reliance upon the advice of counsel. *Williamson v. United States,* 207 U.S. 425, 28 S.Ct. 163 (1908); *Spirt v. Bechtel,* 232 F.2d 241 (2d Cir., 1956).

However, the bearing of the role of counsel in this case on the question of intent goes well beyond the simple rule set forth by the court in its charge. As the testimony of both Malmon and Ruth Appelton, the government's expert, adequately established, it is conceded among lawyers that compliance with the Securities Laws involves sufficiently great complexities to require the services of counsel who specialize in that field. Where, as here, such special counsel is retained, the relationship is substantially different from that which was described by the court in its charge. Where compliance with complex rules of law is required, the function of counsel is not limited to merely accepting from the client that information which the client deems to be material. On the contrary, counsel is expected to question his client carefully in order to develop the necessary information.

The attorney is not simply rendering an opinion, he is guiding his client in complying with the law. It is the function of the attorney to tell the client what is material and what in-

formation must be included in the Offering Circular. Malmon conceded that he never even discussed with his client the information which the Information charges to have been wilfully omitted. The jury was clearly required, in determining the existence of intent, to consider the extent to which defendants' conduct was the result of their reliance on an attorney to guide them.

Moreover, that issue is not limited to Cohen. Duboff, too, was entitled to an acquittal on that charge, if the jury believed that he was relying on the skill of special counsel in the preparation of the Offering Circular. The issue of intent is not a technical, legal one. It is a question of common sense. Any bona fide reliance on the skill or knowledge of a lawyer by anyone will have a logical tendency to nullify wilful intent.

For all of the foregoing reasons, the court's charge so prejudiced Duboff that a reversal of the conviction is required.

CONCLUSION

For all of the foregoing reasons and for all of the reasons set forth in the briefs of the co-appellants which are incorporated herein, the Indictment should be dismissed or in the alternative, the conviction of appellant Duboff should be reversed and a new trial granted.

Respectfully submitted,

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MORTON S. ROBSON
Of Counsel

October, 1974

STATE OF NEW YORK)
: SS:
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 16 day of Dec. , 1974 deponent served the within BRIEF upon U.S. Atty. So. Dist. of N.Y.

attorney(s) for Appellee

in this action, at US Ct. House
Foley Sq., New York, N.Y.

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey
.....
ROBERT BAILEY

Sworn to before me, this
16 day of Dec. 1974

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976